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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-628

LIBERTY NATIONAL LIFE INSURANCE COMPANY, and BROWN-SERVICE FUNERAL HOMES COMPANY, INC.,
Petitioners,

vs.

EDGAR H. BATTLE, d/b/a EDGAR H. BATTLE FUNERAL HOME; OTIS ARMOUR, JR., d/b/a ARMOUR FUNERAL HOME; JOHNSON MEMORIAL FUNERAL DIRECTOR, INC.; TAYLOR HODGE, d/b/a HODGE FUNERAL HOME; HENRY CILLIE, d/b/a CILLIE FUNERAL HOME; EUGENE ERVIN, d/b/a ERVIN FUNERAL HOME; S. T. MADDEN, d/b/a MADDEN FUNERAL HOME; S. C. PERRYMAN, d/b/a S. C. PERRYMAN FUNERAL HOME; R. L. LUMZY, JR., d/b/a LUMZY FUNERAL HOME; J. K. JEFFRIES and FLOYD E. LONG, IND. & d/b/a HAMILTON FUNERAL HOME; WHITFIELD MILES, IND. & d/b/a MILES FUNERAL HOME,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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To the United States Court of Appeals for the Fifth Circuit

I

PRAYER FOR PETITION

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for

the Fifth Circuit which reversed the Order of the District Court dismissing respondents' amended complaint and remanded the cause to the District Court for further proceedings.

II

OPINION BELOW

There was no opinion delivered by the District Court. The opinion of the Court of Appeals for the Fifth Circuit is reported at 493 F.2d 39 (1974), and is set forth in Appendix A herein.

III

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was dated and entered on April 25, 1974. A copy of the judgment is set forth in Appendix A. Timely application for rehearing by petitioners was denied on October 23, 1974. See notice in Appendix A. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is 28 USC 1254(1).

IV

QUESTIONS PRESENTED FOR REVIEW

1. Does the issue and performance of a life insurance policy payable in funeral services and merchandise constitute the "business of insurance" within the meaning of the McCarran-Ferguson Act so as to exempt such activities, when regulated by the state, from the federal antitrust laws?

2. What relief, if any, should be granted in a private treble damage action brought under the federal antitrust laws against a business for conduct which is permissible under the terms of a judicially approved Consent Decree entered 16 years before the private suit was brought?

3. Does concert of action between a parent corporation and its wholly-owned subsidiary operating as one organization in the issue of life insurance by the parent and assistance in performing the policy by the subsidiary constitute actionable combination and conspiracy under the federal antitrust laws (1) where they are under the same management, (2) conduct a single business, (3) do not compete with each other, (4) do not hold themselves out to the public as doing so, and (5) the subsidiary is formed for reasons other than market considerations?

V

STATUTES INVOLVED

Statutes which the case involves are §§ 1 and 2 of the Sherman Act, 15 USC, §§ 1, 2; § 4 of the Clayton Act, 15 USC § 15; and the McCarran-Ferguson Act, 15 USC §§ 1011-1013. These statutes are printed and attached as Appendix B herein.

VI

STATEMENT OF THE CASE

A. Nature of Proceedings and Jurisdiction of District Court

Ten funeral directors (respondents) brought an action against Liberty National Life Insurance Company and its wholly-owned subsidiary, Brown-Service Funeral Homes Company, Inc. (petitioners) claiming that petitioners, in issuing and per-

forming certain life insurance policies violate the federal anti-trust laws. (R. 2-6) The suit claimed violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. (R. 6) Jurisdiction of the District Court was invoked under Sections 4 and 26 of the Clayton Act. 15 USC 15, 26. (R. 6)

B. Statement of Facts as Made by the Pleadings

1. Identity of petitioners

Liberty National is engaged in the business of issuing the usual lines of life insurance, including group, ordinary, and industrial life insurance policies. (R. 8-9) Among the industrial life insurance policies issued by it are policies providing benefits in funeral services and merchandise rather than cash. (R. 9-10) These policies are commonly referred to as burial insurance policies. (R. 9) They contain usual provisions found in cash life insurance policies such as nonforfeiture benefits, accidental death benefits, premium waiver provisions, cash surrender values, and beneficiary designations. However, such policies, instead of providing a benefit in cash upon the death of the insured, provide burial services and burial merchandise for the burial of the deceased insured (R. 9-10).

The merchandise provided consists of casket and burial clothing; the services provided include embalming, use of funeral parlor, a place where the memorial service may be held, assistance in conducting the service, and transportation of the remains of the deceased to the place of interment. (R. 10) These benefits are provided through the facilities of a funeral director authorized by the insurance company. (R. 10-11) If the services of an authorized funeral director are not used, the benefits under the policy are limited to the furnishing of a casket and burial clothing, and, in some instances, to a cash benefit. (R. 11, 61, 65) If the insured dies outside the State of Alabama, the benefits of the policy are payable in cash. (R. 61, 77)

The most numerous of such burial insurance policies issued by Liberty National are those which provide burial benefits having a retail value of $300 and $600. (R. 11) The only substantial difference between these two policies is in the type of casket furnished. (R. 11) In one, a wood casket is provided. (R. 11) Under the other, a metal casket is provided. (R. 11) Both provide essentially the same funeral services. (R. 11)

These burial insurance policies have had wide acceptance in Alabama, the only state in which the company issues such policies. (R. 9) During the years complained of, there were approximately 2.8 million of such burial insurance policies in force in Alabama, and it is alleged that 42% of all persons who died in Alabama during the period complained of owned such burial insurance policies. (R. 12, 17) As a life insurance company, Liberty National sells, issues, performs, various forms of life insurance policies. It does not do business as a funeral director and owns no funeral home business. (R. 168) Instead of providing such burial benefits directly, Liberty National chooses, for federal income tax reasons hereinafter explained, to provide these benefits through a corporate division, its wholly-owned subsidiary, the defendant, Brown-Service. (R. 15)

Brown-Service operates as an incorporated division of Liberty National Life Insurance Company under the same management and carries on no other business than to provide for the performance of burial insurance policies issued by the parent. (R. 14, 27) Brown-Service does not do business as a funeral director and does not own a funeral home business. (R. 168) It performs the burial insurance policy benefits for its parent in two ways. (R. 75-76) First, it furnishes the funeral merchandise such as the casket and the funeral clothing for the deceased insured. (R. 15, 18, 75-76) Then, it purchases from independently owned funeral directors throughout the State of Alabama the services provided by the policy such as embalming and preparation of the body, a place where me-

morial services may be held, assistance in conducting the services, and transportation of the remains of the deceased to the place of interment. (R. 10, 75)

When a burial insurance policy has been performed in such manner, the life insurance company pays its subsidiary, Brown-Service, for such performance—that is, the furnishing of both the funeral merchandise and the funeral services. (R. 79-80) The subsidiary, Brown-Service, provides the funeral merchandise at its own expense, and then pays to the independent funeral directors from whom it has purchased the services an amount of money previously agreed upon between Brown-Service and the funeral director. (R. 33-34, 93-94)

To assure that the funeral services promised will be provided when the burial insurance policy matures by death of the insured, Brown-Service enters into written agreements with funeral directors throughout the state to provide those services when called upon by the family of the deceased insured. (R. 15) Funeral directors who agree to provide such services are called "authorized funeral directors"—that is, they have agreed in advance to provide the services promised by the burial insurance policies at an agreed upon price. (R. 15-16) When an insured under such policy dies in Alabama, an authorized funeral director is called. The funeral director transports the deceased to the funeral home, provides the services called for under the policy, and releases the casket and funeral clothing which Brown-Service has consigned to the premises of the funeral director to be used for such purposes. (R. 9-10) When these are furnished, the life insurance company has fulfilled the policy obligations. (R. 79, 9, 18-19, 33-34) The entire transaction is, thus, the issue of the burial insurance policy and the performance of that policy upon its maturity by providing funeral merchandise and services. (R. 9, 27)

Brown-Service, the wholly-owned corporate subsidiary of Liberty National, engages in no other business than the ac-

tivities hereinabove described and the incidental activities that it must do to perform in the manner outlined. (R. 14) Since it must furnish the casket, it manufactures some in its own plant and purchases others in the open market. (R. 17-18) It is prohibited by the Consent Decree from selling caskets which it manufactures to funeral directors. (R. 169) Since it must furnish the burial clothing, it acquires the same in the open market. (R. 18) To get the caskets and the burial clothing to the premises of the authorized funeral directors, Brown-Service delivers such merchandise on consignment to the premises of the authorized funeral director to be available as needed in the performing of the burial insurance policies. (R. 88, 92)

2. **Funeral directors in Alabama**

There are approximately 224 funeral directors in Alabama. (R. 16, 40) They provide funeral services and funeral merchandise for the preparation for burial and interment of deceased persons. (R. 16) Most of these businesses in Alabama are independently owned, and neither Liberty National nor Brown-Service owns any interest in any such business. (R. 168) A few of the funeral home businesses in Alabama are owned by other insurance companies which also issue burial insurance policies in the state. Any funeral director in Alabama, which meets minimum, uniform, non discriminatory standards of acceptability may, simply upon request, become an authorized funeral director and provide the services for performing of the benefits under burial insurance policies issued by Liberty National. (R. 171) As a consequence, out of some 224 funeral directors in Alabama, 192 (85%) have agreed that they will provide such services. (R. 16, 40) They are the "authorized" funeral directors. (R. 16) Seven of the 32 funeral directors in Alabama who are not "authorized," are owned by competing insurance companies who issue burial insurance policies. (R. 16)

Those funeral directors who are "authorized" may and do perform similar services under burial insurance policies issued by other insurance companies. (R. 15-16, 169-170) Activities of the authorized funeral directors are not in any way circumscribed. (R. 133) They may carry on their regular business of providing funeral services and funeral merchandise to members of the public and of providing funeral services and funeral merchandise in fulfillment of the obligations of burial insurance policies issued by any other insurance company. (R. 169) They may sell additional services and additional or different funeral merchandise for deceased insureds over and above, or different from, that provided under the burial insurance policy. (R. 88, 92-93) If additional services and merchandise over and above those provided by the policies are purchased, the funeral director simply credits upon such "oversales" the stated retail value of the policy, and is paid by Brown-Service the agreed charges for the policy services. (R. 89, 92-93) Of course, the funeral director charges the family of the deceased insured for the additional services and merchandise which the funeral director provides and which is not provided under the policy. (R. 89, 92) However, the burial insurance policy does provide complete funeral services and funeral merchandise for the burial of a deceased where only policy services and merchandise are desired. (R. 60-67, 100-103)

3. **Identity of respondents**

Each of the respondents is a funeral director. (R. 2) Five of them are "authorized" funeral directors, that is, they have agreed to perform the funeral services promised by Liberty National in fulfilling its obligations under burial insurance policies issued by it. (R. 2, 7) The other five respondents are not authorized funeral directors—that is, they have not agreed to provide services on behalf of the insurance company in fulfilling its obligations under burial insurance policies issued by it. (R. 1-2) All

of respondents complain that the petitioners, in issuing and performing burial insurance policies, as hereinabove outlined, combine, and conspire in restraint of trade under Section 1 of the Sherman Act, that they monopolize or attempt to monopolize or combine and conspire to monopolize or attempt to monopolize interstate trade and commerce under the provisions of Section 2 of the Sherman Act, and that their activities constitute price fixing in violation of Section 3 of the Clayton Act. (R. 6, 27-36, 37-45, 45-53).

4. **Alabama regulates the business of insurance**

The business of insurance including burial insurance is pervasively regulated by the State of Alabama. (R. 119-121) Such regulation includes the licensing of companies and agents, the prescription of policy provisions, compliance with standard valuation and nonforfeiture laws requiring adequate reserves to be maintained, assets are required to be valued in such a way as to assure solvency, the companies are subject to periodic examination to assure compliance and their ability to perform the policies they issue, policy forms must be filed with and approved by the Commissioner of Insurance. (R. 120) A more detailed review of such regulation is set out later in this petition.

5. **1954 Consent decree entered in United States of America v. Liberty National Life Insurance Company and others.**

For more than 16 years before the suit was filed, the petitioners operated in accordance with the terms and provisions of a Final Judgment entered by the United States District Court in Birmingham in a suit brought by the Justice Department on behalf of the United States of America against the petitioners, Civil Action No. 7719-S. (R. 153-173) Said Final Judgment detailed a course of subsequent conduct for these petitioners in

the performance of burial insurance policies issued by Liberty National in such a detailed and specific manner that it constituted a charter by which these petitioners have been guided in the performance of such burial insurance policies. (R. 168-173) The Final Judgment proscribed certain conduct on the part of petitioners:

a. Do not acquire, establish, own or operate any funeral home business in Alabama. (R. 168)

b. Do not acquire any interest or make any investment in any other person, firm or corporation selling burial insurance in Alabama. (R. 168)

c. Do not acquire or own, or invest in any other person, firm or corporation manufacturing, distributing, or selling funeral merchandise in Alabama. (R. 168)

d. Do not permit any of your officers, directors or employees to serve as an officer, director or employee of any funeral director in Alabama or of any other person who sells funeral insurance in Alabama. (R. 169)

e. Do not manufacture, distribute or sell funeral merchandise in Alabama except that which is manufactured and distributed for performing burial insurance policies issued by Liberty National. (R. 169)

f. Do not designate or appoint any furneral director in Alabama as agent for the sale of funeral insurance policies or the collection of premiums thereon. (R. 169)

g. Do not hinder, restrict, limit or prevent any funeral director in Alabama from purchasing funeral merchandise from any person or from performing or contracting to perform funeral services for any person, including specifically policyholders of other burial insurance companies. (R. 169)

h. Do not enter into any contract with any funeral director which tends to limit or restrict such funeral director in

furnishing funeral services for any person or company. (R. 169-170)

i. Do not restrict the territory in which any funeral director may do business. (R. 169-170)

j. Do not grant an exclusive right in any territory to any funeral director to perform burial insurance policies for the insurance company. (R. 169-170)

k. Do not hinder, restrict or prevent any funeral director from selling funeral merchandise and funeral services to any person. (R. 170)

l. Do not limit or restrict the number of funeral home businesses which any funeral director may own or operate. (R. 170)

m. Do not hinder, restrict or prevent any funeral director from buying funeral merchandise from any person. (R. 170)

n. Do not require the funeral director to buy funeral merchandise from any designated person, firm or company. (R. 170)

On the other hand, the Final Judgment prescribed that the defendants must take positive action in certain areas:

a. Upon expiration of the initial term specified in any funeral service contract, existing on the date of entry of the Final Judgment, and before renewing such contract, do terminate and cancel any provision of such contract which grants to the funeral director the exclusive right to provide funeral services for policyholders of Liberty National in any area in Alabama or which prevents petitioners from appointing any other funeral director in such area.

b. Do upon the termination, cancellation or expiration of any such funeral service contract publish reasonable,

uniform and nondiscriminatory standards of acceptibility for a contract with funeral directors and do upon request of any funeral director so qualified enter into a funeral service contract with him. (R. 171)

c. Do furnish a copy of the Final Judgment to each contract funeral director in Alabama. (R. 172)

d. Do provide in each funeral service contract that the funeral director may purchase funeral merchandise from and perform services for any person. (1972)

This charter of conduct with its specific proscriptions and prescriptions further provided that representatives of the Justice Department have access to the books and records of the defendants at any reasonable time, and that the defendants submit written reports to the Department of Justice which might from time to time be requested to assure compliance with and enforcement of the Final Judgment. (R. 172-173)

Finally, the court retained jurisdiction of the parties for the purpose of enabling any of them to apply to the court at any time for such orders and directions as might be necessary or appropriate for the carrying out of the provisions of the Final Judgment, for its modification, for its enforcement, and to punish violations. (R. 173)

Pursuant to the terms of the Final Judgment, representatives of the Justice Department have from time to time requested reports from defendants which were provided and have examined books and records of petitioners, and at no time has the Department of Justice informed these petitioners or the District Court of non-compliance with any of the provisions of the Final Judgment. (R. 106-107)

VII

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

A

This Court Should Hold That the Issue and Performance of a Life Insurance Policy Payable in Funeral Services and Merchandise Constitute the "Business of Insurance" Within the Meaning of the McCarran-Ferguson Act So as to Exempt Such Activities From Suit Under the Federal Antitrust Laws.

Petitioners contend that the regulation of the insurance business of petitioners by the State of Alabama operates to supplant the Federal antitrust laws and, therefore, that respondents have failed to state a claim upon which relief can be granted. The District Court so held with respect to Liberty National, but refused to extend the exemption to Brown-Service. The Fifth Circuit thought that there should be a development of factual averments before making a determination that petitioners were "engaged solely in the business of insurance as contemplated by the McCarran Act". *Battle v. Liberty National Life Insurance Company*, 493 F.2d 39, 51 (5 Cir. 1974). It is the position of these petitioners that the pleadings conclusively establish that the activities complained of constitute the "business of insurance" within the meaning of the McCarran Act and that the action of the District Court in dismissing the claim as to Liberty National should be affirmed and extended to Brown-Service.

1. **The McCarran-Ferguson Act.**

Petitioners rely on the provisions of the McCarran-Ferguson Act, 15 USC §§ 1011-1015 (hereinafter in this petition referred to as McCarran Act) to sustain their petition. Section 1012 thereof provides, in pertinent part:

"(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . .: *Provided, That after June 30, 1948, . . . the Sherman Act, and . . . the Clayton Act, . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law.*" (Emphasis added)

Section 1013 of the Act in pertinent part provides:

"(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate or act of boycott, coercion, or intimidation."

To come within the exemption of the McCarran Act, therefore, the activities must constitute "the business of insurance", these activities must be regulated by the state, and there must not be agreements or acts to boycott, coerce or intimidate.

2. **The activities complained of constitute the "business of insurance".**

The most recent delineation by this Court of the meaning of "business of insurance" as those words are used in the McCarran Act is found in *Securities and Exchange Commission v. National Securities*, 393 U.S. 453, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969):

"Insurance companies may do many things which are subject to paramount federal regulation; only when they

> are engaged in the 'business of insurance' does the statute apply. Certainly the fixing of rates is part of this business; that is what South-Eastern Underwriters was all about. The selling and advertising of policies, FTC v. National Casualty Co., 357 U.S. 560, 78 S.Ct. 1260, 2 L.Ed.2d 1540 (1958), and the licensing of companies and their agents, cf. Robertson v. People of State of California, 328 U.S. 440, 66 S.Ct. 1160, 90 L.Ed. 1366 (1946), are also within the scope of the statute. Congress was concerned with the type of state regulation that centers around the contract of insurance, the transaction which Paul v. Virginia held was not 'commerce.' The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the 'business of insurance.' Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the 'business of insurance.' "

Subsequent decisions in other courts have further identified and delineated the "business of insurance". Title insurance companies engaged in the issue of title insurance policies and activities related thereto are engaged in the business of insurance. *Commander Leasing Co. v. Transamerica Title Insurance Co.*, 477 F.2d 77 (10 Cir. 1973); *Crawford v. American Title Insurance Co.*, 1974—2 Trade Cases ¶75,320 (D.C., Ala., 1974); *Harrison v. Chicago Title Insurance Co.*, 1974—2 Trade Cases ¶75,321 (D.C., Kan., 1974); *Mitgang v. Western Title Insurance Co.*, 1974—2 Trade Cases ¶75,322 (D.C. Cal., 1974). Mutual life insurance companies issuing life insurance policies and their related activities are engaged in the business of insur-

ance. *Steingart v. Equitable Life Assurance Society*, 366 F. Supp. 790 (S.D.N.Y., 1973). Insurance companies issuing policies of hospital insurance are so engaged. *Travelers Insurance Company v. Blue Cross of Western Pennsylvania*, 361 F.Supp. 774, Aff'd 481 F.2d 80 (3 Cir. 1973). Burial insurance companies issuing burial insurance policies and performing them in a manner similar to the petitioners are engaged in the "business of insurance". *Holly Springs Funeral Home v. United Funeral Service*, 303 F.Supp. 128 (D.C. Miss., 1969). In each of these decisions the activities were held to be exempt from suits for alleged violations of the federal antitrust law.

In *Blue Cross*, the charge was that in issuing and performing hospital policies, Blue Cross violated Sections 1 and 2 of the Sherman Act. Blue Cross issued hospital insurance policies providing hospital services for its insureds and then contracted with various hospitals for those services at charges agreed upon between the insurance company and the hospital. In the relevant market Blue Cross provided hospital insurance for 51% of the population, and during the relevant period accounted for 62% of all patient days which were covered by commercial insurance. The Court held that Blue Cross was engaged in the business of insurance, that the State of Pennsylvania regulated such activities, that there were no sufficient acts of agreements of boycott, coercion or intimidation, and recognized the exemption provided by the McCarran Act from suits under the federal antitrust laws.

The activities of the petitioners are quite similar to the activities complained of in Blue Cross. Liberty National issues a life insurance policy providing funeral services and merchandise. Like Blue Cross, it does not provide those benefits directly, but rather contracts with independent funeral directors throughout the relevant market to provide such funeral services.

A District Court under strikingly similar factual averments and complaints upheld the McCarran exemption. *Holly Springs*

Funeral Home v. United Funeral Services, 303 F.Supp. 128 (D.C. Miss. 1969). There, the plaintiff funeral director brought a class action against the defendant insurance company and its affiliated funeral homes alleging that the activities of such insurance company in issuing burial insurance policies similar to those issued by Liberty National and arranging with its affiliated funeral homes to provide the services under such policies violated the federal antitrust laws.

3. **State regulation**

The State of Alabama pervasively regulated the business of insurance and the activities of the petitioners in issuing and performing life insurance policies payable in funeral services and merchandise. For more than 70 years prior to the filing of this suit the Alabama Code had regulated insurance companies and their activities beginning with the Code of Alabama (1896) Chapter 63. A contract of insurance was defined to be "A contract . . . by which one party . . . promises to pay money, or its equivalent or do some act of value . . . upon the destruction or injury of something in which the other party has an insurable interest." Code of Alabama (1896) § 2576. In 1927 the Alabama Legislature expressly provided for regulation of burial insurance policies. Code of Alabama (1940) Tit. 28 § 259. In 1935 the Alabama Legislature provided for the licensing of insurance companies issuing burial insurance, the valuation of such policies, the reserves to be maintained thereon, and for the examination of such companies. Act No. 114 General Acts of Alabama, Regular Session 1935, codified in Chapter 10 Tit. 28 Alabama Code (1940).

In 1957 the Alabama Legislature enacted the so-called All-Industry Fair Trade Practices Act to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the McCarran Act by defining, or providing

for the determination of, all such practices in Alabama constituting unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined. Code of Alabama (1940) Titl. 28 Section 90(1)-90(14).

The promulgation of Alabama Insurance Department Regulation No. 24 on November 18, 1957 formalized the requirements of many years standing that:

> "Each and every company licensed to do business in the State of Alabama shall submit to the Department of Insurance for filing and having accepted for filing by the Department of Insurance all Life Insurance Policy Forms, . . . prior to delivery or issue of same in this State.
>
> "This shall include, but not limited to Ordinary, Industrial, Group and Annuity Contracts . . ."

In 1971 the Alabama Legislature enacted into law a comprehensive revision of the Alabama Insurance Code, now codified as Title 28A of the Alabama Code. Burial insurance is expressly regulated in Chapter 17. Such insurance is defined to be, "that form of life insurance under which (a) benefits are provided in the form of merchandise and services incident to the burial of the insured. . . " Title 28a § 392(2). The issuance of any policy of life insurance is prohibited until the form has been filed and its provisions approved by the Department of Insurance. Title 28A § 321. The Alabama Insurance Code contains more than 800 sections regulating the business of insurance.

Burial insurance policies must contain "A provision that the insurer has contracted with and appointed an authorized funeral director . . . in this state to furnish the merchandise and services provided by the policy." Title 28A § 398. Such provisions have long been upheld by the Alabama Courts. In *Hunter v. Brown-Service Funeral Co.* (1941), 241 Ala. 25, 200 So. 869, 872, the Alabama Supreme Court said:

> "All that is promised the insured is that the company, . . . will furnish the merchandise and services promised either itself, or through its authorized undertaker . . . ."

Examining a policy of burial insurance substantially similar to those issued by Liberty National, the Fifth Circuit said in *Commissioner v. W. H. Luquire Burial Association*, 102 F.2d 89 (5 Cir. 1939):

> "We can find no real distinction between the policy of insurance issued by the taxpayer here and the policies of ordinary industrial life insurance issued by a number of the major insurance companies . . . The mere fact that the policy is payable not in money, but in something of value equal to money, does not, as a matter of law, exclude it from classification as an insurance contract."

The Alabama courts have recognized funeral insurance policies to be policies of life insurance. *Liberty National Life Insurance Company v. Stringfellow*, 38 Ala. App. 594, 92 So. 2d 924, cert. den. 265 Ala. 561, 92 So. 2d 927 (1956). See also *Booker T. Washington Burial Insurance Company v. Williams*, 27 Ala. App. 393, 173 So. 269; *Jordan Mutual Aid Association v. Asberry*, 26 Ala. App. 105, 154 So. 120.

In addition to the All-Industry Fair Trade Practices Act specifically applicable to insurance companies, the state has long prohibited unlawful combinations, trusts and monopolies. Since 1907 any person, firm or corporation injured or damaged by an unlawful trust, combine or monopoly has a right of action to sue those creating, operating, aiding or abetting such and to recover damages therefor. Tit. 7 § 124. At all times pertinent to the claim of the plaintiffs, the laws of Alabama have declared contracts in restraint of trade to be void (Tit. 9 §§ 22-24), and they have provided penalties. Tit. 57 §§ 106-108. The Alabama antitrust laws are patterned after similar statutes in

other states and are "akin" to the Federal statute known as the Sherman Anti-Trust Act of July 2, 1890. *Georgia Fruit Exchange v. Turnipseed*, 9 Ala. App. 123, 62 So. 542 (1913).

Recently a Federal district court in Alabama has reviewed the insurance laws of the state and found "without question" that those laws have generally regulated title insurance, and concluded that the All Industry Fair Trade Practices Act is fully applicable to the business of insurance so as to exempt such business from the Federal Antitrust Laws. *Crawford v. American Title Insurance Co.*, 1974—2 Trade Cases, ¶ 75,320 (D.C., Ala., 1974).

State regulation of the business of insurance under the McCarran Act exists when state statutes generally proscribe or prescribe or permit certain conduct on the part of the insurance companies. *California League of Independent Insurance Producers v. Aetna Casualty & Surety Co.*, 175 F.Supp. 857 (N.D. Calif. 1959); Accord, *Ohio AFL-CIO v. Insurance Rating Board*, 451 F.2d 1178 (6 Cir. 1971), cert. den. 409 U.S. 917, 93 S.Ct. 215, 34 L.Ed.2d 180 (1972). It is the existence of the regulatory scheme which is decisive and not the efficacy or wisdom of the enactments. *Commander Leasing Co. v. Trans-America Title Insurance Co.*, 477 F.2d 77, 84; *Ohio AFL-CIO v. Insurance Rating Board*, supra; *Allstate Insurance Co. v. Lanier*, 361 F.2d 870 (4 Cir. 1966), cert. den. 385 U.S. 930, 87 S.Ct. 290, 17 L.Ed.2d 212 (1966). To satisfy the requirements of the McCarran-Ferguson Act, state procedure need not be what plaintiff, or the courts, think is the wisest or the most effective type of regulation. *Fleming v. Travelers Indemnity Co.*, 324 F.Supp. 1404, 1406 (D. Mass. 1971).

Recent decisions of several courts have held that if a state has an antitrust law or Fair Trade Practices Act which applies to the business of insurance, these laws are sufficient for the McCarran Act to operate as a bar to a Federal antitrust action

relating to the business of insurance. *Steingart v. Equitable Life Insurance Society*, 366 F. Supp. 790, 794 (S.D.N.Y. 1973); *Crawford v. American Title Insurance Co.*, 1974—2 Trade Cases ¶ 75,320 (D.C. Ala., 1974); *Mitgang v. Western Title Insurance Co.*, 1974—2 Trade Cases ¶ 75,322 (D.C. Cal., 1974).

4. **Boycott, coercion and intimidation**

Recognizing that the activities complained of are the "business of insurance" and that the State regulates these activities, respondents seek to extricate themselves from the bar of the McCarran exemption by lacing their complaint with bald allegations of "boycott, coercion and intimidation." Such bald conclusions, without substantiating factual allegations are insufficient to invoke the exemption. See *Crummer Company v. DuPont*, 223 F.2d 238 (5 Cir., 1955), cert. den. 350 U.S. 848, 76 S.Ct. 85, 100 L.Ed. 755 (1956); *Kinnear-Weed Corp. v. Humble Oil and Refining Co.*, 214 F.2d 819 (5 Cir., 1954), cert. den. 348 U.S. 912, 75 S.Ct. 292, 99 L.Ed. 715 (1955); *Nelson Radio and Supply Co. v. Motorola*, 200 F.2d 911 (5 Cir., 1952), cert. den. 345 U.S. 925, 73 S.Ct. 783, 97 L.Ed. 1356 (5 Cir., 1953).

Recently the Ninth Circuit found, after reviewing the legislative history of the McCarran Act and decisions of other courts, that the "boycott, coercion and intimidation" provisions of the McCarran Act are restricted in their operations and are limited to acts among insurance companies and agents. In *Addrisi v. Equitable Life Assurance Society of U. S.*, ... F.2d ..., 1974—2 Trade Cases ¶ 75,274 (9 Cir., Sept. 30, 1974), it was said:

> "We agree with the rationale expressed in each of those cases in that it is evident from an examination of the

> legislative history behind § 1013(b) that the intent of Congress was to reserve unto the reach of the Sherman Act only a narrow area of restraint of trade activity among those in the business of insurance, namely, antitrust acts among insurance companies and agents for the purpose of boycott or coercion among insurance companies and agents."

Three Federal district courts have also found the "boycott" provisions under the McCarran Act to have a very narrow meaning and have limited its application to the area indicated in *Addrisi*. See *Transnational Insurance Co. v. Rosenlund*, 261 F.Supp. 12, 16-27 (D.C. Ore., 1967); *Meicler v. Aetna Casualty and Surety Co.*, 372 F.Supp. 509 (S.D. Tex., 1974); *Mitgang v. Western Title Insurance Co.*, 1974—2 Trade Cases ¶ 75,322 (D.C. Cal., 1974).

Contrary to *Addrisi* and the decisions therein cited, the Fifth Circuit in these proceedings extended the operation of the exception to respondents to eviscerate the McCarran Act exemption. Even assuming that the Fifth Circuit was right and the Ninth Circuit wrong, construing the complaint most favorable to the respondents, the only substantial allegations of "boycott" and "coercion" do not, in fact, constitute the prohibited conduct. The "boycott" apparently alleged is that petitioners do not pay funeral directors who are not authorized to perform funeral services for the deceased insured of Liberty National when those funeral directors do, in fact, perform funeral services for a deceased insured under some arrangement with the funeral director. It is clear, however, that the complaint alleges no duty, contractual or otherwise, upon the funeral director to perform such services for the petitioners or for the petitioners to pay such funeral directors who do provide the services. Those funeral directors who complain of "boycott" have the key in their own hand. Petitioners are directed by the provisions of the Final Judgment of a Federal

District Court to permit any funeral director in Alabama meeting minimum, uniform standards of acceptability, who agree in advance to furnish such services under the policy, to do so. Those respondents who do not want such contract, do not wish to assume the obligations thereof, and refuse of their own volition to enter into such contract, cannot claim that they have been boycotted by petitioners. The decision to enter into such contract is in their own hands. See *Gorham & Johnson v. Chrysler Corp.*, 308 F.2d 462 (5 Cir., 1962), cert. den. 372 U.S. 912, 83 S.Ct. 725, 9 L.Ed.2d 719 (1963). While usually petitioners would have a right to announce in advance the circumstances under which they would deal with funeral directors (*U. S. v. Colgate Co.*, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919)), these petitioners are under the mandate of the consent decree to deal with any funeral director, including any of the respondents, who requests such relationship and assumes the obligations to provide the services. The choice is in the funeral director. Petitioners cannot make a funeral director agree to perform, and a funeral director cannot claim to be boycotted because it refuses to request the right to perform and to assume the obligations of such performance. The choice is that of the funeral director, and if the funeral director refuses such contract, he cannot claim a boycott of him by petitioners.

On the other hand, those respondents who are authorized funeral directors claim "coercion" because, they insist, that they cannot stay in business unless they have a funeral service contract with the petitioners. This alleged "coercion" does no more than to confirm public acceptance of burial insurance in the State of Alabama. Such assertions are similar to the "economic coercion" alleged in Blue Cross. The Court of Appeals there agreed with the District Court that such "economic coercion" was insufficient:

> "The evidence likewise negates the presence of coercion or intimidation on the part of Blue Cross, and Travelers'

theory of 'inherent coercion' predicated upon the proposition that the hospitals had 'no alternatives' because of 'community pressure' does no more than lend credence to Blue Cross' 'thrust upon' defense, which is grounded on the existence of historic accident, superior product, and business acumen as the reasons for its superior competitive position. Community attraction and economic appeal are the antithesis of coercion and intimidation." (*Travelers Insurance Company v. Blue Cross of Western Pennsylvania*, 361 F.Supp. 774, 780).

Those respondents who do not have a funeral service contract claim a boycott. Those respondents who do have such contract claim coercion. One class of respondents complains because they have the contract; the other class complains because they do not have the contract. These complaints simply do not constitute boycott, coercion or intimidation so as to nullify the exemption granted to these petitioners by the McCarran Act.

Respondents do allege that petitioners threatened to build a competing funeral home in an area served by a funeral director who had a funeral service contract but who voluntarily expressed his intention to terminate such relationship. That one funeral director was informed by the petitioners that if such relationship were terminated they would seek another funeral director in the same community to provide the funeral service as an authorized funeral director. Surely this candid advice cannot be so unreasonable as to amount to "intimidation". At the most it was only an offer of competition to the terminating funeral director. It certainly is not intimidation for petitioners to seek the service of a funeral director to perform obligations which petitioners are legally obligated to perform when one who has been performing those services announces his intention no longer to do so.

To conclude, the bald allegations of boycott, coercion and intimidation are insufficient; respondents are not in the class

covered by this exception to the McCarran Act; and the alleged instances of boycott, coercion and intimidation are insufficient as a matter of law to deny the exemption of the McCarran Act to the activities of petitioners.

5. Conclusion

The activities of these petitioners constitute the "business of insurance"; the State of Alabama regulates those activities; the allegations of boycott, coercion and intimidation are insufficient to eviscerate the exemption; and the complaint should be dismissed for failure to state a claim upon which relief can be granted. This was the holding of the District Court with respect to Liberty National, but it should also extend to the activities of the Petitioner, Brown-Service. The "sole function" of Brown-Service, as recognized by the plaintiffs, is "to provide funeral services and merchandise for the defendant, Liberty National Life Insurance Company". (R. 27). This Court held in *Sunkist Growers v. Winckler & Smith Citrus Products*, 370 U.S. 19, 82 S.Ct. 1130, 8 L.Ed.2d 305 (1962) that three operationally separate corporations constituted one association or organization to make effective an exemption from the antitrust laws of 12,000 growers.

This is consistent with other holdings of this Court that such reasonable ancillary activity as is necessary to make governmental regulation of an industry "work" is included within any express antitrust exemption granted to the regulated activities. *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963).

B

This Court Should Determine What Relief, if Any Should Be Granted in a Private Action Under the Federal Antitrust Laws Against a Business for Conduct Which Is Permissible Under the Terms of a Judicially Approved Consent Decree.

The relief, if any, which may be granted a private party in a suit under the federal antitrust laws against a party for conduct which is permissible under the terms of a judicially approved consent decree is an important question of federal law which has been probed and sounded in extensive litigation and which should be settled by this Court. That there is immunity from the operations of the antitrust laws under other circumstances is well known. State action is protected. *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). Federal statute may grant exemption. *Sunkist Growers v. Winckler & Smith Citrus*, etc., 370 U.S. 19, 82 S.Ct. 1130, 8 L.Ed. 2d 305 (1962). Compliance with orders of federal administrative agencies provides immunity. *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 93 S. Ct. 647, 34 L.Ed.2d 577 (1973) and *Pan American World Airways v. United States*, 371 U.S. 296, 83 S. Ct. 476, 9 L.Ed.2d 325 (1963). The cases recognize that a judicially approved consent decree may operate as a "kind of umbrella" over the activities of a party to such decree. *International Telephone and Telegraph v. General Telephone and Electronic Corp.*, 351 F. Supp. 1153, 1176 (D.C. Hawaii 1972). It is the extent and limit of that immunity which is involved in this petition.

Petitioners contend that conduct by a party which is permissible under the terms of a judicially approved consent decree affords complete immunity from treble damages and retrospective relief and affords conditional or limited immunity to suits for prospective relief.

Petitioners recognize that a third party may seek relief in a private action, by intervention with consent of the Court, or by

persuading the Department of Justice to seek relief in the court which has retained jurisdiction of the consent decree proceedings. *Sam Fox Publishing Company v. United States*, 366 U.S. 683, 81 S. Ct. 1309, 6 L.Ed. 2d 604 (1961); *United States v. ASCAP* (Applications of Shenandoah Valley Broadcasting, Inc.), 331 F.2d 117 (2 Cir. 1964) cert. den., 377 U.S. 997, 84 S.Ct. 1917, 12 L.Ed. 2d 1048 (1964) and *Columbia Broadcasting System v. ASCAP*, 337 F.Supp. 394 (S.D.N.Y., 1972). Thus petitioners recognize that respondents may seek relief against petitioners for violations of the antitrust laws even though the activities of the petitioners are permissible under the terms of the consent decree. What petitioners do contend, however, is that the respondents could not be granted relief in the instant action.

1. **Respondents were not entitled to damages.**

Respondents sought treble damages. They were not entitled to this relief. General Electric Company operated for many years under a consignment agency system held not to be violative of the antitrust laws. *United States v. General Electric Company*, 272 U.S. 476, 47 S.Ct. 192, 71 L.Ed. 362 (1926) and *United States v. General Electric*, 82 F.Supp. 753 (D.N.J. 1949). However, in a subsequent action the United States sought declaratory judgment and injunctive relief against G. E. claiming that it had altered its system of operation in a manner not contemplated by the court's decree, and that its activities had become unlawful and violative of the federal antitrust laws. The court in *United States v. General Electric Company*, 358 F.Supp. 731 (S.D. N.Y., 1973),* stated:

> "G. E. stresses its good faith adherence through the years since the 1926 case to the pattern of the consignment

* After hearings, final judgment was entered in this proceeding by the District Court in January, 1974 and such final judgment is not reported in the Federal Trade Cases or in the West Reporter System.

agency system held valid there. But this is not a reason for holding the system is still valid. I see no basis for a finding that because G. E. has enjoyed a preferred position under the antitrust laws for many years, its immunity should be made virtually perpetual.

"The relief sought by the Government here is prospective only. I see no reason why G. E. should be subject to private treble-damage actions arising from its understandable reliance on the prior determinations in its favor. The decree here should provide that it have prospective effect only." (Emphasis supplied).

Thus, the court held that a party to a consent decree cannot be liable in treble damages in suits by third party for conduct permissible under the terms of the court's decree, even though that method of operation may be violative of the federal antitrust laws. Similarly, these petitioners contend that they cannot be liable to respondents in treble damages for permissible activities under the consent decree.

2. **The Respondents are not entitled to prospective relief.**

Even prospective relief may not always be granted to plaintiffs who sue a party for activities permitted under consent decrees. Two decisions involving ASCAP and its members point out the extent to which prospective relief may be granted and the conditions under which it may be granted. In *K-91, Inc. v. Gershwin Publishing Company*, 372 F.2d 1 (9 Cir. 1967) cert. den. 389 U.S. 1045, 88 S.Ct. 761, 19 L.Ed.2d 838, radio stations defended a suit for copyright infringement by claiming that plaintiffs violated the federal antitrust laws. ASCAP and its members had operated under the provisions of a consent decree and amendments thereto for more than 20 years. From a judgment in favor of the parties operating under the consent

decree there was an appeal to the Ninth Circuit. Circuit Judge Barnes, who had previously been the Assistant Attorney General of the United States in charge of the Antitrust Division, conceived the litigation in this language:

> "This litigation skirts a very perplexing problem long existing in federal antitrust laws, to wit, the extent to which relief, if any, should be granted against a business for conduct which is permissible under the terms of a judicially approved consent decree. Put another way, the question is whether a consent decree by its terms can immunize against further prosecution for violation of the antitrust laws."

He then decided that, since the parties had operated in compliance with the decree, the antitrust laws were not violated, and that the parties were disinfected and immunized from liability as a potential combination in restraint of trade. So finding, the court affirmed the judgment in favor of the parties operating under the consent decree.

Then, CBS sued ASCAP for alleged antitrust violations. *Columbia Broadcasting System v. ASCAP*, 337 F.Supp. 394 (S.D. N.Y., 1972) In the suit CBS proposed an alternative method of licensing to that which had been provided under the consent decree. The court held that this suggestion by CBS was sufficient to overcome a motion for summary judgment based upon the consent decree, and distinguished the actions of CBS in offering the suggestion from the action of K-91 in not offering any suggestion. The court pointed out that a consent decree establishes a "regulatory system" for the activities of a party conducted under the consent decree, and that this regulatory system grants exemption and immunity from the antitrust laws. However, the immunity and exemption granted under such regulatory system is limited to the "minimum extent necessary" to permit the activities regulated to be carried on without un-

duly encroaching upon the federal antitrust laws. Two rules may then be deduced from the decision of the court in CBS. Third parties who do not come forward with feasible proposals for changing the terms of an existing consent decree, but claim only that the parties operating under the decree violate the antitrust laws, can be afforded no relief because the consent decree immunizes and disinfects the parties under the "rule of reason" test. This was what the court in CBS found to be the holding of the court in K-91. On the other hand, third parties who in their suit come forward with feasible proposals to change the terms of a consent decree may be granted relief if they can prove that the regulatory system set up by the consent decree can be changed in such manner as to lessen the encroachment upon the antitrust laws and still permit the activities governed by the consent decree to be carried on. Such procedure as the court suggested in CBS complies with the holding of this Court in *Sam Fox Publishing Company v. United States*, supra, that relief granted in a private action against a business conducted under a consent decree must, "as a matter of comity at least . . . build on the foundations of the [consent decree]". (366 U.S. 683, 694)

The Fifth Circuit recognized that respondents might seek intervention in the prior suit by the United States which resulted in the consent decree if they believed that petitioners were not conducting themselves in accord with the decree. Petitioners do not contend that this relief suggested by the Fifth Circuit was unavailable to respondents. Neither do petitioners contend that the respondents could not seek prospective relief in the private action which they brought. But what petitioners do contend is that the relief sought by the respondents in this private action could not be granted. Damages could not be awarded. Respondents did not propose suggestions for changing the terms of the consent decree so that the regulatory system established thereunder might encroach to the minimum extent necessary on the federal antitrust laws, as was held in *Columbia Broadcasting*

System v. ASCAP, supra. Rather the respondents are in the same position as the parties who alleged violations in K-91. They proposed no feasible change, and, therefore, were not entitled to any relief.

It is only fair and equitable, as the court by its holding in CBS recognized, that a third party who complains of antitrust violations against parties for conduct permissible under the terms of the consent decree should come forward with positive feasible proposals for amending the consent decree. A party should not be permitted to allege broad violations of the antitrust laws where a consent decree exists with the hope that after an extended trial some unknown and unsuggested change in the regulatory system might result. The party who complains should at least have the responsibility of suggesting at the outset the feasible proposals to obtaining the relief.

Finally, the Fifth Circuit in its opinion in these proceedings below stated (493 F.2d 39, 53):

> "And assuming, without deciding, that damages for past injuries sustained as a result of such a decree are not recoverable, we are not persuaded that plaintiffs would not be entitled to prospective injunctive relief."

Petitioners submit that the Fifth Circuit should have decided that petitioners were not entitled to damages, and, furthermore, that respondents were not entitled to prospective injunctive relief because they did not submit in their complaint a feasible proposal for any such relief. See *Columbia Broadcasting System v. ASCAP*, 337 F.Supp. 394 (S.D.N.Y., 1972) and *K-91, Inc. v. Gershwin Publishing Company*, 372 F.2d 1 (9 Cir. 1967) cert. den. 389 U.S. 1045, 88 S.Ct. 671, 19 L.Ed.2d 838.

Petitioners are authorized by the statutes of Alabama to issue burial insurance policies. In 1954 a federal district court in a suit brought by the United Sates against these petitioners

accommodated the practices of these petitioners in issuing and performing such burial insurance policies to the restrictions of the federal antitrust laws. That consent decree did establish for these petitioners a regulatory system so that they might carry on a business expressly authorized by the laws of Alabama in such manner as not to violate the antitrust laws. Thus, such consent decree established an accommodation between the restrictions of the federal antitrust laws and activities expressly authorized by the State of Alabama. In doing so, the consent decree did what this Court later held in *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed. 389 (1963) to be proper—recognize the immunity and exemption from the antitrust laws to the minimum extent necessary to accommodate to the activities authorized by a federal statute.

It is submitted by petitioners that if respondents had come forward in their complaint and offered a better mode of accommodation, they should have been heard on the question of prospective relief. However, since the respondents asked only for treble damages and offered no feasible proposal to improve the accommodation of the consent decree, respondents are not entitled to any relief in this action and the dismissal by the district court should be affirmed.

C

This Court Should Determine That Concert of Action Between a Parent Corporation and Its Wholly-Owned Corporate Subsidiary Operating as One Organization in the Issue of Life Insurance by the Parent and Assistance in Performing the Policy by the Subsidiary Does Not Constitute Actionable Combination and Conspiracy Under the Federal Antitrust Laws Because (1) They Are Under the Same Management, (2) Conduct a Single Business, (3) Do Not Compete With Each Other, (4) Do Not Hold Themselves Out to the Public as Doing So, and (5) the Subsidiary Is Formed for Reasons Other Than Market Considerations.

This is an important question in the administration of the antitrust laws upon which there appears to be conflict between the Circuits and in which there is thorough-going uncertainty on the part of the business community, antitrust counsel, enforcement agencies, and the courts, leaving no one able to point with confidence to the location of the boundaries between legal and illegal business conduct in this area of the law. See Willis & Pitofsky, "Antitrust Consequences of Using Corporate Subsidiaries", 43 NYU Law Rev. 20, 21 (1968).

For at least 25 years this question has received attention in various treatises and commentaries.* (Id. Footnote)

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* Schwartz, Control of Affiliates, in How to Comply with the Antitrust Laws 240-42 (J. Van Cise & C. Dunn ed. 1954); Adelman, Integration and Antitrust Policy, 63 Harv. L. Rev. 27, 50-51 (1949); Barndt, Two Trees or One?—The Problem of Intra-Enterprise Conspiracy, 23 Mont. L.Rev. 158, 197-99 (1962); Handler, Contract, Combination or Conspiracy, 3 ABA Antitrust Section 38, 46-48 (1953); Handler, Some Misadventures in Antitrust Policy Making, 76 Yale L.J. 92, 119 (1966); Krause, The Multi-Corporate International Business Under Section 1 of the Sherman Act—Intra-Enterprise Conspiracy Revisited, 17 Bus. Law. 912, 925-29 (1962); McQuade, Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act, 41 Va. L. Rev. 183, 208-12 (1955); Rahl, Con-

The basic premise, of course, is that in order to constitute a contract, combination and conspiracy under the antitrust laws, there must be a plurality of actors. See *Poller v. Columbia Broadcasting System Co.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed. 2d 458 (1962); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1950); *United States v. Piowaty & Sons*, 251 F. 375 (D.Mass., 1917); *United States v. MacAndrews & Forbes Co.*, 149 F. 823 (2 Cir., 1906); *Milgram v. Loew's*, 192 F.2d 579 (2 Cir., 1951); *Pittsburg Plate Glass Co. v. United States*, 260 F.2d 397 (4 Cir. 1958); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5 Cir., 1952); *American Tobacco Co. v. United States*, 147 F.2d 93 (6 Cir., 1944); *United States v. Gasoline Retailer's Ass'n, Inc.*, 285 F.2d 688 (7 Cir. 1961). While plurality of actors by consensus as well as the express language of the statute is an essential to antitrust violations under Section 1 of the Sherman Act and under the combination and conspiracy aspects of Section 2 of the Act, it has never been determined that simply because a company uses incorporated subsidiaries in the conduct of its business that that company stands naked before the antitrust laws. It has been observed (Willis & Pitofsky, supra), that:

> "When a company conducts its business through branches, divisions or departments rather than separately incorporated subsidiaries, business arrangements between those branches, divisions, or departments ordinarily go unchallenged under the antitrust laws . . . When a company uses incorporated subsidiaries, however, there is authority for the legal position that those corporate com-

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spiracy and the Anti-Trust Laws, 44 Ill. L.Rev. 743 (1950); Sprunk, Intra-Enterprise Conspiracy, 9 ABA Antitrust Section 20 (1956); Stengel, Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act, 35 Miss. L.J. 5, 27 (1963); Comment, Intra-Enterprise Conspiracy Under the Sherman Act, 63 Yale L.J. 372, 388 (1954). But see Solo, Intra-Enterprise Conspiracy and the Theory of the Firm, 34 J.Bus. 153 (1961); Note, The Sherman Act and Multi-Corporate Single-Traders: Competition Among Affiliates?, 100 U. Pa. L.Rev. 1006, 1022-25 (1952).

ponents are capable of combining or conspiring so as to violate various provisions of the antitrust laws. This concept . . . would render conduct by an enterprise using the multi-corporate form as vulnerable to antitrust attack as if it were the conduct of independent competitors."

The courts, the commentators, and the administrators all seem to concede that merely because one organization does business through corporate divisions or departments it does not bare itself to absolute liability under the antitrust laws, but the areas of such multi-corporate activities have never been defined by this Court.

1. **Decisions of this court.**

This court remarked in *United States v. General Electric Company*, 272 U.S. 476, 47 S.Ct. 192, 71 L.Ed. 362 (1926), that:

> "As the Westinghouse Lamp Company is a corporation all of whose stock is owned by the Westinghouse Electric and Manufacturing Company, and is but its selling agent, we may treat the two as one, . . ."

Four more recent decisions are, however, usually cited and referred to for the proposition that a corporation and its subsidiaries may contract, combine and conspire in a manner prohibited by the antitrust laws.

(a) *United States v. Yellow Cab Co.*, 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947).

There, an individual, together with others, controlled various stock interests in taxicab operating companies in several major cities and a taxicab manufacturing company. This Court held that simply because the defendants were commonly owned did

not immunize them from prosecution for conspiracy under Section 1. The operating companies in that case competed with each other and held themselves out to the public as doing so. Yellow Taxicabs ostensibly competed with Checker Cabs. Yet these companies made agreements to reduce the number of cabs in operation to serve the public. Both served the public and held themselves out to the public as competing operators.

(b) *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951).

In this case, this Court sustained a treble damage verdict against Seagram and its subsidiary companies who were found to have fixed maximum resale prices on their products and to have enforced such prices. In doing so this Court observed that the doctrine of intraenterprise conspiracy "is especially applicable where, as here [Seagram and Calvert], hold themselves out as competitors."

(c) *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951).

In this case three companies related by substantial stock ownership entered into various antitrust competitive agreements aimed at dividing up the world market between themselves and excluding competition from outsiders. These companies held themselves out to the public as competitors. This court held that the common ownership did not "liberate them" from the "impact of the antitrust laws."

(d) *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968).

Here a group of commonly owned companies were accused of coercing independent distributors through the use of require-

ments and tying contracts and the imposition of territorial and price limitations. This Court flatly rejected the common ownership defense and pointed out that several other bases existed under which these defendant's actions met the multi-party requirements of Section 1. In this case it was alleged that the parent and the subsidiary held themselves out as competitors. See *Tamaron Distributing Corp. v. Weiner*, 418 F.2d 137 (7 Cir. 1969). While this Court held that, ". . . since respondents . . . availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities", it is believed that this Court did not commit itself to the principle that businesses which choose the multi-corporate form thereby give up the conditions of Section 1 of the Sherman Act that the restraint of trade must be accomplished through a plurality of independent actors.

2. **Decisions of other courts.**

Other courts in which this problem has been raised have considered an enterprise may use the multi-corporate form without absolute vulnerability to antitrust attack.

(a) *Joseph E. Seagram & Sons v. Hawaiian Oke and Liquors, Ltd.*, 416 F.2d 71 (9 Cir. 1969), cert. den. 396 U.S. 1062, 90 S.Ct. 752, 24 L.Ed.2d 755, rehearing den. 397 U.S. 1003, 90 S.Ct. 1113, 25 L.Ed. 2d 415 (1970).

Here the Court distinguished between a parent and its wholly-owned subsidiary which competed and those which did not compete in the sale of liquor. It held that a corporation and its wholly-owned corporate subsidiary, Barton & Barton-Western, which did not compete nor hold itself out to the public as doing so could form no "actionable" conspiracy or combination under Sections 1 and 2 of the Sherman Act.

(b) *Beckman v. Walter Kidde & Co.*, 316 F.Supp. 1321 (S.D. N.Y. 1970), Aff'd 451 F.2d 593 (2 Cir. 1971)

Here a former distributor of products manufactured and distributed by the defendant parent and wholly-owned subsidiary brought an action claiming that the refusal of the defendants to sell the plaintiff any more fire extinguishers amounted to combination and conspiracy in restraint of trade in violation of Section 1 and to monopolize commerce in violation of Section 2. The District Court said (316 F.Supp. 1321, 1325-1326):

> "Recognizing the insufficient foundation of the claimed conspiracy between Kidde and its distributors, Beckman sought to save his cause by the belated allegation that Fyre-Safety and Kidde engaged in an illegal conspiracy, citing Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951), condemning a conspiracy between two subsidiaries of a parent company. Kiefer-Stewart, however, is distinguishable on the crucial ground that the conspiracy in that case was between two competing subsidiary companies, whereas in the instant case Beckman does not contend or offer any evidence to indicate that Fyre-Safety and Kidde were in competition with one another. To the contrary, paragraph Sixth of the complaint alleges that 'WALTER KIDDE & COMPANY, INC., dealt with and used the property and assets of the said defendant, FYRE-SAFETY, INC., and the said WALTER KIDDE & COMPANY, INC. so dominated the affairs of the said co-defendant, FYRE-SAFETY, INC., so as to deprive the said FYRE-SAFETY, INC., of a mind, will or existence of its own.'
>
> "Assuming that there were some discussions between Kidde and its puppet, Fyre-Safety, which resulted in a refusal to sell to Beckman, the court cannot conclude that such discussions constitute a combination within the

meaning of Section 1 of the Sherman Act or that they represent more than internal dialogue leading to a decision on the part of a single business unit to exercise its right to select or disenfranchise a particular distributor. See Alpha Distributing Company of California v. Jack Daniel's Distillery, etc., 207 F.Supp. 136 (N.D. Cal. 1961), affirmed 304 F.2d 451 (9th Cir. 1962). The district court case of Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc., 272 F.Supp. 915 (D. Haw. 1967), heavily relied on by Beckman in support of a broad application of Kiefer-Stewart, was recently reversed by the Ninth Circuit, stating at the time that 'Surely a manufacturer and its national or regional distributor, whether a subsidiary or an independent, can agree to transfer their business from one wholesaler to another without running afoul of the group boycott per se rule, in the absence of some forbidden anti-competitive or monopolistic objective.' Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 81-82 (9th Cir. 1969), cert. denied 396 U.S. 1062, 90 S.Ct. 752, 24 L.Ed.2d 755 (1970). The conclusion that the Kiefer-Stewart principle is inapplicable, is consistent with the virtually unanimous opinion of legal commentators that too broad an application of this principle—in the words of two such commentators—'is inconsistent with the basic approach of antitrust limitations on business conduct. It would unreasonably penalize companies that resort to the incorporated form of doing business, hampering achievement of legitimate business goals unrelated to antitrust considerations, without substantially improving the capacity of the antitrust system to deal with anti-competitive conduct.' Willis & Pitofsky, Anti-Trust Consequences of Using Corporate Subsidiaries, 43 N.Y.U.L.Rev. 20, 24 (1968). See note 47 of this article for a listing of commentators disputing the logic and advisability of a broad application of Kiefer-Stewart."

(c) Other Decisions.

Other courts addressing themselves to similar circumstances have at least held that it is doubtful that mere concept of separate entities under common ownership acting as a single business or enterprise where they do not compete and do not hold themselves out to the public as doing so violate the contract, combination and conspiracy requisite of the antitrust laws. *I. Haas Trucking Corp. v. New York Fruit Auction Corp.*, 364 F.Supp. 868 (S.D.N.Y.), 1973; *Alpha Distributing Company of Cal. v. Jack Daniel Distillery*, 207 F.Supp. 136 (W.D. Cal. 1961); *Allen Ready Mix Concrete Co. v. John A. Denie's Sons Co.*, 1972 Trade Cases ¶ 73,955 (W.D. Tenn. 1972).

3. **Policy of Antitrust Division of Department of Justice.**

Federal enforcement policy rarely has attempted to take advantage of the broad potential inherent in the proposition that simply because a firm does business through corporate divisions that it imperils itself to unusual hazards under the antitrust laws. The "Report of the Attorney General's National Committee to Study the Antitrust Laws" noted in 1955 that the Department of Justice had, "Never brought an action against a parent and its subsidiary corporations . . . charging a conspiracy solely in restraint of trade of the affiliated defendants". Report of U. S. Attorney General's National Committee to Study the Antitrust laws, 34 (1955). In a speech before the Antitrust Section of the American Bar Association Mr. Donald Turner said:

> "[W]e should not press to the limits afforded by past decisions wherever on present evaluation those decisions appear to have gone too far. We should not, for example, attempt to push the intra corporate conspiracy doctrine as far as a free wheeling-interpretation of the Timken case might suggest." 10 Antitrust Bulletin 685, 687 (1965)

On February 22, 1971, Assistant Attorney General Richard W. McLaren in charge of the antitrust division of the Department of Justice wrote to the General Counsel of the Federal Reserve Board a letter setting out the position of the Department of Justice with respect to the intra-enterprise conspiracy doctrine and stated:

> "A corporation may establish subsidiaries for various financial, legal or commercial reasons. Since such multiple corporations have an identical goal—to earn profits for their common cause—they should not be expected to act with respect to each other as if they were independent competitors.
>
> "The Department of Justice has adopted a policy of using the intra-enterprise conspiracy doctrine to challenge, under Section 1 of the Sherman Act, practices engaged in by commonly-controlled firms only where the practice has a coercive or restrictive effect on outsiders. As a result, we have not challenged, and do not expect to challenge, internal arrangements within a corporate group as to prices or markets for the products or services of the corporation within the group; this is a traditional corporate management function. Instead, we have limited our use of the intra-enterprise doctrine to situations in which the commonly-controlled firms have pooled their power in a manner which has adverse competitive effects on independent business entities. See, e.g., United States v. General Tire Co., et al. [1970 Trade Cases ¶ 73,364], D.C.N.D. Ohio, Civil Action No. C-67-155. Such an application of the doctrine is consistent with the facts of the leading Supreme Court decisions."

4. Views of textwriters and commentators.

One writer on this subject has observed:

> "The rule that parent and subsidiary corporations or affiliated corporations may constitute two or more actors for the purpose of Section 1 would, if broadly construed, make it impossible for any corporation to do business in a multi corporate form. Unqualified, the rule would deprive a majority or, even, sole shareholder (the parent) of any voice in the management of the corporation (the subsidiary)." Von Kalinowski 16 Business Organizations, Matthew Bender & Company § 6.01[2], P 6-32.

In McQuade, "Conspiracy, Multicorporate Enterprises and Section 1 of the Sherman Act", 41 Virginia L.Rev. 183, 216 (1955), it is said:

> "Within the present Sherman Act, there is no place for a doctrine of intra-enterprise conspiracy. No logical stopping point exists short of giving a prosecutor carte blanche to attack virtually all multicorporate enterprises. The next logical step would be to admit that coordinate action within a corporation which functions through divisions ought not to be treated differently from that within an enterprise which by historical accident happens to use corporate rather than divisional form. The effect is to read the requirement of conspiracy out of the Act, and to make the presence or absence of restraint the only criterion of violation."

In "Antitrust Consequences of Using Corporation Subsidiaries", 43 NYU L. Rev. 20, this point is put in perspective:

> "When a company conducts its business through branches, divisions, or departments rather than separately incorporated subsidiaries, business arrangements between those branches, divisions, or departments ordinarily go un-

challenged under the antitrust laws. In effect, the branches, divisions, and departments are free to agree among themselves as to prices, territories, classes of customers, levels of production, and the other aspects of planning generally associated with the industrial and marketing process. When a company uses incorporated subsidiaries, however, there is authority for the legal position that those corporate components are capable of combining or conspiring so as to violate various provisions of the antitrust laws. This concept is often referred to as the 'intra-enterprise' or 'bathtub' conspiracy doctrine. and an extreme application of that doctrine would render conduct by an enterprise using the multi-corporate form as vulnerable to antitrust attack as if it were the conduct of independent competitors."

In 16 *Von Kalinowski Business Organizations, Antitrust and Trade Regulations*, at pp. 6-34, it is said:

"A review of the cases indicates that the courts have refused to declare as unlawful concerted action solely between a parent and its subsidiary or subsidiaries where the purpose and effect of the joint action is not unreasonably to restrain the trade of outsiders (i.e., competitors or customers)."

5. **Congressional statement of policy.**

A broad interpretation of the intra-enterprise conspiracy doctrine would render illegal the ordinary conduct of virtually every multi-corporate enterprise, and, as pointed out in the Willis & Pitofsky article, supra, is contrary to the statement of policy contained in ¶ 3 of § 7 of the Clayton Act, originally enacted in 1914 and left unchanged in the 1950 amendment, which provides:

"Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the for-

mation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition." (15 USC 18)

6. **Proposed rule.**

The solution to this problem is suggested by Willis & Pitofsky, "Antitrust Consequences of Using Corporate Subsidiaries", 43 NYU D.Rev. 20, 35:

"Assuming that the broad intra-enterprise conspiracy doctrine cannot be accepted, the question arises as to what more limited interpretation of that doctrine is consistent with the cases and with sound antitrust policy.

With respect to possible problems under the Sherman Act, we suggest that antitrust liability of a multi-corporate enterprise, beyond that which would apply to a single firm, is called for in only two limited situations:

1. Where the enterprise chooses to do business with corporate components and those components publicly adopt a competitive posture.

2. Where the enterprise chooses to do business through corporate components with the specific intent of using those components to achieve an anticompetitive result.

Such an approach is a workable solution and fully consistent with a fair reading of the decided cases."

7. The activities of the defendants do not constitute an actionable contract, combination and conspiracy under the antitrust laws.

As authorized by the laws of Alabama the Petitioner, Liberty National, issues life insurance policies providing benefits in funeral services and merchandise. In issuing the policies it must, of course, perform them. It could itself provide the merchandise and the services to perform the policies. However, it has adopted its present method of operating through a wholly-owned subsidiary for reasons which may be gained from reference to the decision in *Commissioner v. W. H. Luquire Burial Association*, 102 F.2d 89 (5 Cir. 1939). The Commissioner insisted that when an insurance company issued a funeral policy and performed it directly, it should not be taxed as a life insurance company but as some other type of organization. While the court did not agree with the Commissioner, shortly after that decision Congress made it certain by enacting what has become Section 801(f) of the Internal Revenue Code providing:

> "A burial or funeral benefit insurance company engaged *directly* in the manufacture of funeral supplies or the performance of funeral services shall not be taxable under this part [life insurance companies] but shall be taxable under Section 821 or Section 831." (Emphasis supplied)

Since for more than 70 years Liberty National has been in the life insurance business and since only a relatively small portion of its life insurance business involves funeral insurance policies, to retain its tax status as a life insurance company, Liberty National chose that its burial policy should be performed *indirectly* through its wholly owned corporate subsidiary. That is Brown-Service. Brown-Service, for the payments received by it from its parent, provides the funeral merchandise and the funeral services to perform the burial insurance policies. As set forth in the statement of the case, Brown-

Service provides the funeral merchandise directly through consignment to the funeral director and purchases from independent funeral directors the funeral services. At least since the entry of the Consent Final Judgment in 1954 Brown-Service has engaged in no other business. As recognized in the complaint, its sole function is to furnish the services and merchandise for its parent in performing burial insurance policies. It identifies itself with Liberty National. It does not hold itself out to the public as being a separate operating corporation. It does not compete with its parent. It does not sell burial insurance policies. It does not compete with the plaintiff funeral directors. It does not sell funeral services. Its sole function, as recognized in the complaint, is to serve as a corporate division of its parent to assist its parent in performing the obligations of the burial insurance policies issued by the parent.

It is respectfully submitted, therefore, that this concert of action between Liberty National and Brown-Service does not constitute an actionable contract, combination and conspiracy under Section 1 of the Sherman Act nor under those provisions of Section 2 of the Sherman Act for the reasons that the petitioners: (1) are under the same management, (2) conduct a single business, (3) do not compete with each other, (4) do not hold themselves out to the public as doing so, and (5) the subsidiary is formed for reasons other than market considerations.

As stated by this Court in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 82 S.Ct. 1130, 8 L.Ed.2d 305 (1962), "There is no indication that the use of separate corporations had economic significance in itself or that outsiders considered and dealt with the three entities [two in our case] as independent organizations."

The test of actionable combination and conspiracy of a corporation and its wholly-owned subsidiary announced by the Fifth Circuit in its opinion in Battle that corporation must

simply be "operationally two separate organizations", if permitted to stand, would make the multi-corporate form of doing business in the Fifth Circuit extremely hazardous, make meaningless the requisite of combination or conspiracy, and the presence or absence of restraint of trade would become the only criterion of violation of Section 1 and a part of Section 2 of the Sherman Act. It is submitted that this test is so broad as to be meaningless and deserves the review and correction of this Court.

VII

CONCLUSION AND PRAYER FOR WRIT

It is respectfully submitted that the questions set forth in this Petition raise important questions of federal law which have not, but should be, settled by this Court, and that the opinions expressed by the Fifth Circuit conflict with the decisions of other Courts of Appeals. Therefore, petitioners respectfully pray that a Writ of Certiorari be issued by this Court to review the opinion of the Court of Appeals for the Fifth Circuit. In such review, this Court might determine these suggestions to have merit:

1. The issue and performance of a life insurance policy payable in funeral services and merchandise constitute the "business of insurance" and, if regulated by state law, are exempt by the McCarran Act from the federal antitrust laws.

2. Compliance with the provisions of a Consent Decree entered against a party in suits under the federal antitrust laws provides limited and conditional immunity to such party in private treble damage actions. As to retrospective relief, including treble damages, the immunity is complete. As to prospective relief, the immunity of the Consent Decree is minimal extending only to the extent necessary to reconcile the operations complained of with the antitrust laws.

3. Concert of action between a parent corporation and its wholly-owned corporate subsidiary operating as one organization does not constitute actionable combination and conspiracy under the federal antitrust laws if parent and subsidiary (1) are under the same management, (2) conduct a single business, (3) do not compete with each other, (4) do not hold themselves out to the public as doing so, and (5) the subsidiary is formed for reasons other than market considerations.

Respectfully submitted

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Certificate of Service

Pursuant to Supreme Court Rule 33.1, I hereby certify that I have caused three copies of this Petition for Writ of Certiorari to be deposited in a United States Post Office or Mail Box, with air mail postage prepaid, addressed to Hardin & Stuart, Attorneys at Law, 413 North 21st Street, Birmingham, Alabama 35203, and Pope & Floyd, 502 Fifteenth Street, Phenix City, Alabama 36867, Counsel of Record for Respondents, on this 20th day of November, 1974.

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Attorney for Petitioners

APPENDIX A

Edgar H. Battle, d/b/a Edgar H. Battle Funeral Home et al., Plaintiffs-Appellants, Cross-Appellees,

v.

Liberty National Life Insurance Company et al., Defendants-Appellees, Cross-Appellants.

No. 72-3673.

United States Court of Appeals, Fifth Circuit.

April 25, 1974.

Action was brought by funeral homes and directors against which issued burial policies and insurer's wholly owned subsidiary which supplied merchandise and services required by such policies. The United States District Court for the Northern District of Alabama, Daniel Holcombe Thomas, J., granted motion to dismiss for failure to state claim on which relief could be granted, and plaintiffs appealed. The Court of Appeals, Ingraham, Circuit Judge, held that allegations of complaint were sufficient to state claim on which relief could be granted, and that prior consent decree in government's suit against same defendants did not necessarily preclude recovery.

Reversed and remanded.

1. Monopolies Key 28(6.2)

Allegations of class action complaint by funeral homes and directors of funeral homes against insurer which issued burial

insurance coverage and insurer's wholly owned subsidiary which contracted with insurer to furnish merchandise and services required by burial policies stated antitrust claim on which relief could be granted. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 3, 4, 15 U.S.C.A. §§ 14, 15; McCarran-Ferguson Act, § 2(b), 15 U.S.C.A. § 1012(b); Fed. Rules Civ.Proc. rule 12(b)(6), 28 U.S.C.A.

2. Courts Key 406.1(11)

Scope of appellate review of motion to dismiss for failure to state claim is narrow. Fed.Rules Civ.Proc. rule 12(b)(6), 28 U.S.C.A.

3. Federal Civil Procedure Key 1773

For motion to dismiss complaint to be properly granted, it must be plain that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Fed. Rules Civ. Proc. rule 12(b)(6), 28 U.S.C.A.

4. Federal Civil Procedure Key 1835

Facts alleged in complaint must be presumed to be true, and only when some insuperable bar to relief is obvious from face of complaint is dismissal proper. Fed.Rules Civ.Proc. rule 12(b)(6), 28 U.S.C.A.

5. Monopolies Key 12(1.16)

Corporation can combine and conspire with its wholly owned subsidiary in violation of statute relating to combinations in restraint of trade. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

6. Monopolies Key 12(1.16)

Even though insurer which issued burial policies and wholly owned subsidiary which provided merchandise and services required by such policies were not competitors they could be guilty of combining or conspiring to suppress competition, the ultimate result of which would inure to their mutual benefit. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

7. Monopolies Key 12(1.3)

For purposes of antitrust litigation, relevant market may be as large as nation or as small as particular community. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

8. Monopolies Key 12(17)

Antitrust statute relating to fixing prices by agreement not to use goods of competitor does not apply to sale of services. Clayton Act, § 3, 15 U.S.C. § 14.

9. Monopolies Key 12(17)

Price fixing of services is covered by antitrust statute relating to trusts in restraint of trade. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

10. Monopolies Key 28(6.2)

Complaint in complex antitrust litigation must plainly set forth claim for relief in order to apprise defendant of nature of claim. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 3, 4, 15 U.S.C.A. §§ 14, 15.

11. Courts Key 289(2)

Federal court had jurisdiction of antitrust suit brought by funeral homes and funeral directors against insurer which issued burial policies and wholly owned subsidiary, which furnished merchandise and services required by policies. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 3, 15 U.S.C.A. § 14.

12. Monopolies Key 12(1.1)

Even if proscribed activity is purely intrastate in character, such activity falls within jurisdictional scope of Sherman Act when there is substantial impact on interstate commerce. Sherman Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

13. Monopolies Key 12(1), 17(2.5)

Jurisdictional basis under Clayton Act is narrower than that of Sherman Act. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 3, 15 U.S.C.A. § 14.

14. Monopolies Key 17(1.7)

In order for there to be violation of Clayton Act provision relating to price fixing, some aspect of prohibited conduct must occur in commerce or in course of such commerce the effect of which is to substantially lessen competition or tend to create monopoly in any line of commerce. Clayton Act, § 3, 15 U.S.C.A. § 14.

15. Monopolies Key 28(1.6)

As against motion to dismiss for failure to state claim on which relief can be granted, funeral homes and funeral direc-

tors had standing to maintain antitrust action against insurer which issued burial policies and insurer's wholly owned subsidiary which furnished merchandise and services required by such policies.

16. Monopolies Key 18

As against motion to dismiss antitrust complaint by funeral homes and funeral directors against insurer which issued burial policies and insurer's wholly owned subsidiary which supplied merchandise and services required by such policies, insurer and subsidiary were not within insurance business exemptions contained in McCarran-Ferguson Act. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 3, 15 U.S.C.A. § 14; McCarran-Ferguson Act, § 2(b), 15 U.S.C.A. § 1012(b).

17. Monopolies Key 28(7.7)

Mere existence of consent decree in prior antitrust litigation brought by government did not immunize defendants in such prior action from all antitrust violations. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 3, 15 U.S.C.A. § 14.

18. Monopolies Key 24(15)

Even though defendants in prior antitrust litigation may have complied with terms of consent decree, their activities may have circumvented underlying intent of decree and thereby constituted violations of antitrust laws. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 3, 15 U.S.C.A. § 14.

19. Monopolies Key 24(7), 28(1.6)

Private plaintiff and public plaintiff have cause of action against violator of antitrust laws and their remedies may be pursued in complete disregard of the other. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 3, 15 U.S.C.A. § 14.

20. Monopolies Key 28(7.7)

Even though allegations in antitrust complaint by funeral homes and directors against insurer which issued burial policies and insurer's wholly owned subsidiary which provided services and supplies required by policies were similar to allegations in prior suit by government against same defendants, plaintiffs were not precluded from maintaining suit. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton, Act, § 3, 15 U.S.C.A. § 14.

21. Monopolies Key 28(4)

Where four-year statute of limitations had run since government commenced antitrust action against insurer which issued burial policies and insurer's wholly owned subsidiary which supplied services and supplies required by policies, funeral homes and directors who brought antitrust suit against same parties could not recover for damages sustained prior to commencement of federal suit.

22. Monopolies Key 28(4)

Government's initiation of antitrust suit starts period of limitations running.

23. Monopolies Key 28(4)

When violator of antitrust law fraudulently conceals violation, period of limitations does not begin to run until violation is discovered or should have been discovered. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 3, 15 U.S.C.A. § 14.

24. Monopolies Key (7.7)

Even if consent decree in government's antitrust suit precluded private parties from recovering damages for past injuries, such would not preclude private parties' right to prospective injunctive relief. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 3, 15 U.S.C.A. § 14.

Appeals from the United States District Court for the Northern District of Alabama.

Before Wisdom and Ingraham, Circuit Judges, and Christenberry, District Judge.

Ingraham, Circuit Judge:

The plaintiffs in this class action are funeral homes and directors of funeral homes who allege that the defendants, Liberty National Life Insurance Company and Brown-Service Funeral Homes Company, Inc., are liable to them for violating the anti-trust laws, particularly §§ 1[1] and 2[2] of the Sherman Act

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[1] 15 U.S.C. § 1 (1970). The statute provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title

and § 3[3] of the Clayton Act. The district court granted defendants' motion to dismiss under Rule 12(b)(6) for "failure to state a claim upon which relief can be granted." Because we believe the district court had insufficient facts upon which to conclude that the complaint failed to state a claim, we reverse and remand for factual development.

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shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

[2] 15 U.S.C. § 2 (1970). Section 2 of the Sherman Act provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

[3] 15 U.S.C. § 14 (1970). Section 3 of the Clayton Act provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or con-

The relationships among the parties to this action can be briefly described as follows. Defendant Liberty National Insurance Company issues several different types of insurance, including burial insurance coverage of various policy values. Burial insurance apparently is much desired because, as alleged in the complaint, about 70% of all white persons who died in Alabama in 1970 had coverage under Liberty National's policies. About 50% of all persons, without regard to race, who died that year had such coverage with Liberty National. Currently, Liberty National has 2,800,000 outstanding, valid insurance contracts for the provision of funeral services and merchandise.

Defendant Brown-Service Funeral Homes Company, Inc., a separate corporate entity and wholly owned subsidiary of Liberty National, has contracted with Liberty National to furnish the merchandise and services required by the burial insurance policies issued by Liberty National. In addition to Liberty's paying Brown-Service large sums of money for furnishing these services, Liberty has made at least one large loan to its subsidiary, purportedly for the acquisition of buildings for funeral homes.

Brown-Service in turn has entered into contractual arrangements with many independent funeral homes and directors located in Alabama, ostensibly to perform its obligations under

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tract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

the contract with Liberty National. When the funeral home director signs a contract with Brown-Service, his funeral home becomes an "authorized" home for servicing and furnishing merchandise to Liberty National burial insurance policyholders. Those, of course, who do not sign a contract are considered "unauthorized" homes. The named plaintiffs in this case consist of five authorized and five unauthorized funeral homes and directors. Importantly, the services provided under the policy differ significantly, depending on whether an insured uses an authorized or unauthorized funeral home for performance of the contract. If the insured goes to an authorized home, he is entitled to a casket, burial clothing, embalming, use of the funeral parlor, assistance in the performance of any services, transportation to the cemetery or church, and rail transportation to any place within the continental United States. But if a policyholder takes his business to an unauthorized funeral home, the benefits conferred under the policy include only a casket or, depending on the policy, a cash settlement.

[1] The district court, without supporting analysis, granted the motion to dismiss for essentially three reasons. First, the court held that the plaintiffs have no standing to assert a private cause of action seeking treble damages under § 4 of the Clayton Act.[4] Second, a consent decree entered into between the United States and Liberty National in 1954 was thought to immunize the defendants from suits asserting violations of the anti-trust laws. Third, the court reasoned that the McCarran-Ferguson Act,[5] while it did not exempt Brown-Service, exempted Liberty

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[4] 15 U.S.C. § 15 (1970).

[5] 15 U.S.C. § 1012(b) (1970).

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known

National from liability under the anti-trust laws. At this stage of the proceedings, we cannot agree with the district court's conclusions or with the defendants' additional contentions raised on appeal.

I

[2-4] At the outset, it is important to note that the scope of appellate review of a motion to dismiss for failure to state a claim is narrow. For the motion to have been properly granted, it must be plain that "the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957); Sarter v. Mays, 491 F.2d 675 (5th Cir., 1974); Brett v. First Federal Sav. & Loan Ass'n, 461 F.2d 1155, 1157 (5th Cir., 1972); *see* Dailey v. Quality School Plan, Inc., 380 F.2d 484, 486 (5th Cir., 1967). "[A]ll the Rules require is 'a short and plain statement of the claim' that all give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, *supra*, 355 U.S. at 47. The facts as alleged in the complaint must be presumed to be true, Brett v. First Federal Sav. & Loan Ass'n, *supra*, 461 F.2d at 1157, and only when "some insuperable bar to relief" is obvious from the face of the complaint is dismissal proper. C. Wright, Law of Federal Courts, § 68, at 285 (1970).

[5] With these principles in mind, we turn to the issue whether the complaint sufficiently stated a claim for relief. In an organized fashion the complaint sets forth three bases for relief. The plaintiffs first alleged that "the defendants have engaged in an unlawful combination and conspiracy in unreasonable re-

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as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

straint . . . interstate trade and commerce," violating § 1 of the Sherman Act. 15 U.S.C. § 1. It is well established that a corporation can combine and conspire with its wholly owned subsidiary in violation of § 1 of the Sherman Act. *E.g.* Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598, 71 S.Ct. 971, 95 L.Ed. 1199 (1951); Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203, 205 (5th Cir., 1969). Defendants argue, however, that because Liberty National and Brown-Service are one organization or business unit and not competitors, they are unable to form a combination or conspiracy within the meaning of § 1. We cannot agree.

[6] Even though Liberty National and Brown-Service are not competitors, because Liberty National is in the insurance business while Brown-Service provides funeral services and merchandise, the alleged facts tend to establish that they are operationally two separate organizations entirely capable of combining to restrain trade. That the defendants do not compete with each other in no way precludes them from combining or conspiring to suppress competition, the ultimate result of which would inure to their mutual benefit. While the existence of competition between two organizations would tend to establish their separateness and thus fulfill the requirement that it takes more than one party to create a combination or conspiracy, the absence of such competition does not preclude the existence of two separate organizations. *See* Beckman v. Walter Kidde & Co., 316 F.Supp. 1321 (E.D.N.Y., 1970), aff'd, 451 F.2d 593 (2nd Cir., 1970).

Additionally, the plaintiffs' factual averments, if established, would tend to support a finding of unreasonable restraint of trade. It appears that, since the insurance contract confers far more benefits upon the policyholder if he uses an authorized funeral home rather than an unauthorized home, the policyholder is subtly coerced into dealing only with the authorized home. The imposition of this restraint would effectively foreclose the unauthorized funeral director's access to a substantial portion

of the market. These facts sufficiently apprise the defendants of the nature of plaintiffs' claims, might furnish a basis for relief under § 1 of the Act, and are certainly sufficient to withstand a motion to dismiss for failure to state a claim.

The second basis for relief set out in the complaint is that defendants "unlawfully did monopolize, attempt to monopolize, and did combine and conspire . . . to monopolize a part of the trade and commerce in furnishing funeral services and selling funeral supplies . . . in violation of § 2 of the Sherman Act. . . ." 15 U.S.C. § 2. The Supreme Court in United States v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966), outlined two essential criteria for determining when § 2 has been violated as follows: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident" *Id.* at 570-571; *see* Woods Exploration & Prod Co., Inc. v. Aluminum Co. of America, 438 F.2d 1286, 1304 (5th Cir., 1971).[6]

Measured against these criteria, a claim for relief under § 2 is adequately stated to resist defendants' motion to dismiss. With regard to the possession of monopoly power, frequently defined as "the power to [raise] prices or exclude competition." United States v. E. I. DuPont deNemours & Co., 351 U.S. 377, 391-392, 76 S.Ct. 994, 1005, 100 L.Ed. 1264 (1956), the complaint alleges that Brown-Service currently maintains contractual relationships with one hundred and ninety-two of a total of two hundred and twenty-four funeral homes in Alabama. Of the funeral homes catering particularly to the white community, only seven homes managed to fend off the control of Brown-Service. All seven of these homes, six of which are controlled by one man, sell their own burial insurance. Of the one hundred and

[6] For a helpful summary of anti-trust law, *see* Comment, A Survey of Anti-Trust Law in the Fifth Circuit, 11 Houston L.Rev. (1974).

ten homes catering primarily to the black community, only twenty-five have escaped Brown-Service's domination. Moreover, thousands of persons who die in Alabama are insured by Liberty National burial policies. Since so many persons are insured under Liberty National's policies, and the beneficiaries of these policies obviously would be inclined to use the authorized funeral home because of the far greater benefits conferred under the policy, the unauthorized funeral home is effectively foreclosed from attracting any business from this portion of the funeral market. At Liberty National's instigation and with Brown-Service's assistance, the collective activities of the defendants have resulted in control over a substantial portion of the market in funerals. And it appears true, as the plaintiffs contend, that if a person wanted to enter the funeral business in Alabama, he would have to either sign a contract with Brown-Service or automatically relinquish the opportunity to attract business from this portion of the market. In short, such quantitative dominance tends to establish, at least to withstand a motion to dismiss, the likelihood that defendants could exclude competition and thus possess monopoly power.

[7] As to delineating the relevant market, a cursory reading of the complaint discloses the economic and geographic area of activity in which the defendants conduct their business. Of course, the relevant market may be as large as our nation or as small as a particular community.[7] But it is plain that the defendants' activities, the sale of burial insurance and the performance of their obligations under these policies, basically are within the geographic confines of the State of Alabama. Although there might be some limited excursions outside the territorial boundaries of the state in performing the obligations under the insurance contracts, the perimeters of the "exact spot" of a relevant market need not be outlined. It is enough

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[7] *Id.* Nothing we say here would preclude the district court, upon factual development, from concluding that the relevant market is something larger or smaller than the territorial boundaries of the State of Alabama.

to show a relevant area in which the defendants might exclude competition. *See* United States v. Pabst Brewing Co., 384 U.S. 546, 549-550, 86 S.Ct. 1665, 16 L.Ed.2d 765 (1966). So far as a motion to dismiss is concerned, the complaint indicates the relevant market.

The willful acquisition or deliberateness in gaining such power also is sufficiently covered by the complaint. The contract between Brown-Service and independent funeral homes prohibits such an authorized funeral home from selling any other type of burial insurance, including its own. Additionally, if after the funeral director enters into such a contract he decides that he no longer wants to be bound, the plaintiffs allege that Brown-Service has threatened to construct an authorized funeral home in the vicinity and thereby detract from the present funeral director's business. This threat plainly would coerce the funeral director to refrain from terminating the contract, thus relinquishing the opportunity to sell any other brand of insurance.

Moreover, the contract provides that, when the funeral director provides services under the policy, Brown-Service pays to the director a specified amount depending on the value of the policy. For example, if the policy value is $300, the director receives $90; if the policy value is $600, the director receives $180. Incredibly, however, if an unauthorized home performs the services required by the policy, it receives nothing from Brown-Service. Instead, the authorized home in that area will receive the specified amount even though it has performed no services. In view of Liberty National's preeminent position in the burial insurance market, this suppression of competition in a large sector of that market sufficiently alleges the deliberateness, as against a motion to dismiss, required to establish a violation of § 2 of the Sherman Act.

[8, 9] Third, plaintiffs allege that defendants have violated the price-fixing prohibition of § 3 of the Clayton Act, because

defendants have maintained prices for merchandise required to be furnished under insurance contracts from which the plaintiffs may not deviate. While plaintiffs assert that defendants have fixed prices for various services performed by the funeral homes, price-fixing under § 3 is limited by the statute's language to transactions dealing in "goods, wares, merchandise, machinery, supplies, or other commodities"[8] and therefore does not apply to services. The price-fixing of services would be covered by § 1 of the Sherman Act. But the plaintiffs also allege price-fixing with regard to merchandise. For example, they assert that their contracts with Brown-Service set forth the prices for particular funerals and vaults, that such prices are predetermined by the defendants and that the contract prohibits giving any discounts. Additionally, in an instance designated in the contract when Brown-Service does not provide a casket, such as when the deceased is under four weeks old and both parents have valid Liberty National policies, the funeral home is required to furnish a casket not to exceed $15 in cost. It is also alleged in the complaint that Liberty National has purchased at least one other insurance company and that authorized homes must provide funeral merchandise as required under the policies issued by that company. It is asserted that such merchandise is furnished by authorized dealers at prices set by the defendants.

The problem with these factual assertions is that conceptually they do not fit the normal price-fixing pattern. When the funeral home director provides the specified merchandise, he

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[8] 15 U.S.C. § 14; *see* Comment, A Survey of Anti-Trust Law in the Fifth Circuit, 11 Houston L.Rev. (1974). The allegations of price-fixing concerning services suffer from the same conceptual difficulty as those concerning price fixing of merchandise. The funeral directors do not appear to be selling the services to the policyholder but only performing them and receiving the designated remittance from Liberty National. Because of the liberal rules governing pleading, the plaintiffs will have the opportunity to clarify these allegations on remand.

does not charge the customer any price, nor does the policy-holder remit any payment to the funeral director. Instead, when the funeral home provides its merchandise as required by the contract with Brown-Service, Brown-Service pays the funeral home a specific amount depending on the value of the particular policy.

While these facts are insufficient to establish a claim for price-fixing, the complaint as a whole discloses a state of facts that conceivably could support price-fixing, or even another violation under § 3 such as tying arrangements or exclusive dealing contracts. We therefore leave this question open for the district court to consider on development of the facts.

[10] We can only reiterate that a plaintiff does not have to completely establish his cause of action in the complaint. As noted earlier, the complaint in complex anti-trust litigation must plainly set forth its claim for relief in order to apprise the defendant of the nature of the claim. C. Wright, Law of Federal Courts, § 1228, at 167 (1969). The plaintiffs in the case at hand set forth three separate claims that they believed entitled them to relief, and it does not appear that there is no state of facts they could prove to recover. If any additional information is needed, defendants can resort to such methods of disclosure as discovery or a motion for a more definite statement. The complaint is sufficient to withstand defendants' motion to dismiss.

II

[11, 12] Having concluded that the complaint sufficiently sets forth a cause of action, we must now decide whether there is "some insuperable bar to relief" which justified the district court's dismissal. C. Wright, Law of Federal Courts, § 68, at 285 (1970). Initially, we confirm the district court's judgment that it had subject matter jurisdiction under §§ 1 and 2 of the

Sherman Act and § 3 of the Clayton Act. With respect to the Sherman Act, jurisdiction is established either by the proscribed activities actually being in interstate commerce, or the activities, when considered in the aggregate, have a substantial effect on interstate commerce. Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 234, 68 S.Ct. 996, 92 L.Ed. 1328 (1948); Doctors, Inc. v. Blue Cross, 490 F.2d 48, 50 (3rd Cir., 1973); Lehrman v. Gulf Oil Corp., 464 F.2d 26, 37 (5th Cir., 1972). Even if the proscribed activity is purely intrastate in character, such activity falls within the jurisdictional scope of the Sherman Act when there is a substantial impact on interstate commerce.

Because the facts are not fully developed, subject-matter jurisdiction under §§ 1 and 2 cannot be conclusively determined at this stage of the proceedings. The plaintiffs, however, aver facts that, if established, would support jurisdiction under either test. Among other factual averments, the complaint states that the defendants' activities have occurred in interstate commerce because they received funeral items, such as caskets, that are shipped in interstate commerce, that the caskets are delivered to authorized funeral homes, and that they are used in performing the insurance contracts. Plaintiffs allege that they provide funeral merchandise and services under Liberty National's insurance policies for persons outside the State of Alabama, in the adjacent states, who live, or rather die, in close proximity to an authorized funeral home. Additionally, the plaintiffs allege that they received other funeral merchandise, such as burial clothing, embalming fluid, and other essentials, from outside state manufacturers and used this merchandise in performing their obligations under their contracts with Brown-Service. These averments at least allege a sufficient connection with interstate commerce to bring the plaintiffs within the jurisdictional scope of §§ 1 and 2 of the Sherman Act.

Even if the plaintiffs were unable to show that the proscribed activities were actually in interstate commerce, the complaint alleges sufficient facts, that if established, would support jurisdiction as having a substantial effect on commerce. The funeral insurance business and operation of funeral homes pervades the economic atmosphere in Alabama. As noted previously, almost all of the funeral homes in Alabama have entered into contract with Brown-Service for furnishing services and merchandise, and a large percentage of persons who die in the state have burial insurance contracts with Liberty National. If these facts are established, it appears that such activities, when considered in the aggregate, would have a substantial impact on interstate commerce, and thus satisfy the jurisdictional requirement under the Sherman Act.

[13, 14] With respect to jurisdiction under the Clayton Act, it is normally recognized that the jurisdictional basis is somewhat narrower than that of the Sherman Act. *See* Littlejohn v. Shell Oil Co., 483 F.2d 1140, 1144 (5th Cir., 1973); Lehrman v. Gulf Oil Corp., *supra*, 464 F.2d at 36-37; Cliff Food Stores, Inc. v. Kroger, Inc., *supra*, 417 F.2d at 208-209. In accordance with the terms of the statute, some aspect of the prohibited conduct must occur "in commerce" or "in the course of such commerce," the effect of which is to "substantially lessen competition or tend to create a monopoly in any line of commerce." 15 U.S.C. § 14.

As noted earlier, the factual allegations of price-fixing contained in the complaint do not fit the normal conceptual pattern for price-fixing. The complaint as a whole, however, reveals the possibility that plaintiffs could allege a state of facts to support recovery under § 3. Ultimately, the question of whether there is jurisdiction under § 3 is for the district court upon remand with the benefit of counsel's rearticulation of the claim.

[15] The defendants argue that the trial court properly granted their motion to dismiss because the plaintiffs have no

standing to assert the alleged anti-trust violations. Section 4 of the Clayton Act authorizes a private plaintiff to sue for injuries sustained as a consequence of an anti-trust violation.[9] By the terms of § 4, two criteria must be satisfied before standing is established. In re Multidistrict Vehicle Air Pollution MDL No. 31, 481 F.2d 122, 126 (9th Cir., 1973); *see* Dailey v. Quality School Plan, Inc., *supra*, 380 F.2d at 487. First, the plaintiffs must show that they have suffered injury to "business or property," recently defined as referring to "commercial interests or enterprises." Hawaii v. Standard Oil Co., 405 U.S. 251, 264, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972). The complaint plainly alleges that the commercial enterprise involved in the case at hand is the business of providing funeral services and merchandise, and such is sufficient to satisfy this requirement.

To satisfy the second criteria for establishing standing, plaintiffs must show that their injuries were incurred "by reason of" the defendants' illegal activities. As recently noted by the Supreme Court, the courts of appeals have imposed limitations on this aspect of the standing test, "concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." Hawaii v. Standard Oil Co., *supra*, at 263, n. 14. Without attempting to carefully categorize all the cases in which this problem has been presented, the courts in articulating such limitations have relied on phrases like "direct" injury, or whether the plaintiffs' business falls within the "target area" of defend-

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[9] 15 U.S.C. § 14 (1970).

> Any person who shall be injured in his *business or property by reason of* anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (Emphasis added)

ants' supposedly illegal commercial activity.[10] In this circuit the limitation of this principle has been stated as requiring the plaintiff to show that he is "within the sector of the economy in which the violation threatened a breakdown of competitive conditions and that he was proximately injured thereby . . ." Dailey v. Quality School Plan, Inc., *supra*, 380 F.2d at 487, quoting South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir., 1966). The allegations in the complaint tend to bring the plaintiffs within that economic section where competition is restrained or otherwise suppressed. Collectively, Liberty National and Brown Service are in effect directly competing with the plaintiffs in the sale to the public of funeral merchandise and services. The defendants' sale of such services and merchandise under the insurance contract practically forecloses that portion of the market to both the authorized and unauthorized funeral homes.

[16] Third, defendants contend that they are exempted from application of the anti-trust laws by the provisions of the McCarran-Ferguson Act. Congressional enactment of the McCarran Act created an exemption from the anti-trust laws for activity constituting "the business of insurance to the extent that such business is not regulated by State law." 15 U.S.C. § 1012(b). To determine the applicability of this exemption, it first must be decided what activity constitutes the "business of insurance" within the meaning of the Act.

The Supreme Court in SEC v. National Securities, Inc., 393 U.S. 453, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969), articulated the standard for deciding what activity is the business of insurance under the McCarran Act:

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[10] In In re Multidistrict Vehicle Air Pollution MDL No. 31, 481 F.2d 122 (9th Cir., 1973), Judge Ely analyzes and attempts to categorize the various limitations employed by the courts of appeals. *Id.* at 127, note 7. Judge Ely notes that the test in the Fifth Circuit more closely approximates the "target area" criterion.

> ". . . The statute did not purport to make the States supreme in regulating all the activities of insurance *companies*; its language refers not to the persons or companies who are subject to state regulation, but to laws 'regulating the *business* of insurance.' Insurance companies may do many things which are subject to paramount federal regulation . . . . The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the 'business of insurance.' Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder."

Id. at 459-460.

Recognizing this standard, the Third Circuit recently held in Travelers Ins. Co. v. Blue Cross, 481 F.2d 80, 82 (3rd Cir., 1973), that a contractual arrangement consummated between an insurance company, Blue Cross, and various hospitals for the furnishing of services under insurance policies constituted the business of insurance, and thus the relationship fell within the McCarran exemption. The contract required the hospitals to furnish services to an insured, and the cost to Blue Cross would be only the cost to the hospital, not to exceed a designated ceiling. Significantly, the relationship between the insurance company and the hospitals in *Blue Cross* was a direct contractual relationship. The result of this contract was simply the performance of the insurer's responsibilities owed to the insured under the insurance contract and nothing more.[11]

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[11] The only case we have been able to uncover that is similar to the instant case is Holly Springs Funeral Home v. United Funeral Service, 303 F.Supp. 128 (N.D.Miss., 1969). In *Holly Springs* the plaintiffs claimed that the defendant's sale of burial insurance poli-

While the facts in the case at hand are inadequately developed to make a conclusive determination of this question, it might be plausibly argued that these facts do not constitute the business of insurance as contemplated by the McCarran Act, and thus do not fall within its exemption. The contractual relationship maintained in the instant case is not a direct relationship between the insurance company, Liberty National, and the funeral directors. Instead, Liberty National has entered into a contract with Brown-Service, a separate entity conducting a separate function, and Brown-Service in turn contracts with the individual funeral directors. In attempting to acquire merchandise and services necessary to fulfill its obligations under its policies, Liberty National has created an arrangement with an additional party that has nothing to do with issuing insurance.

The addition of this intermediary is significant because, under the guise and with the assistance of Brown-Service, Liberty National may have exceeded the business of providing burial insurance and encroached upon the business of providing funeral services. In *Blue Cross* the agreement between the insurance company and the hospitals only required the performance of obligations owed to the insured by the insurer under the insurance contract. This plainly relates to the "relationship between the insurance company and the policyholder." SEC v. National Securities, Inc., *supra*. But in the instant case based on the facts alleged in the complaint, it appears that the contractual arrangement between Brown-Service and the authorized funeral directors requires more than just performance of the obligations owed by the insur-

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cies violated §§ 1 and 2 of the Sherman Act and § 3 of the Clayton Act. *Holly Springs* is not controlling here because, as the court pointed out, the restrictions with whom the policyholder could deal were set forth only in the insurance policy. "A funeral home has no contractual obligation with anyone; . . ." But the funeral homes in the instant case are bound by contracts with Brown-Service to perform services and furnish merchandise.

ance company to the insured. Rather the arrangement requires the performance of duties beyond those encompassed by the business of insurance, duties that relate solely to the plaintiffs' businesses in the operation of their funeral homes, and thus the defendants' activities fall outside the McCarran Act exemption. For example, the standard contract between Brown-Service and the funeral directors requires the director to use caskets furnished by Brown-Service when providing services under a policy, to display in the home such merchandise, and prohibits the sale of Brown-Service merchandise to other customers. The director is required to post in noticeable places his prices for funerals and vaults, and he is required to adhere to these quotations without giving discounts to an insured of any particular company. And the funeral home and equipment must be maintained to meet certain standards, as stated by Brown-Service, and is subject to inspection by Brown-Service to insure compliance. While all these obligations are related to the business of insurance, we believe that they are so remotely related as to be subject to the anti-trust laws. Such obligations may go beyond the business of insurance as intended by the McCarran Act and encroach on the business of providing funeral merchandise and services.

Apart from the contractual impositions pertaining more readily to the operation of plaintiffs' undertaking businesses than to the insurance business, it is alleged that Liberty National has engaged in additional conduct that falls outside the ambit of the business of insurance. For example, according to the complaint, Liberty National owns buildings and leases them at favorable rates to persons who agree to become authorized funeral directors. The complaint also asserts that Liberty National lends money to authorized directors, and only authorized directors, presumably for the operation of the funeral homes. The validity of such averments must be decided before conclusively determining that defendants are en-

gaged solely in the business of insurance as contemplated by the McCarran Act.

Even assuming that defendants are engaged in the business of insurance and that it is regulated by state law,[12] this exemption is eviscerated by any boycott, coercion or intimidation on behalf of the defendants.[13] The complaint specifically alleges that the defendants have engaged in such activities. Among other averments, plaintiffs set out in the complaint that, if an authorized funeral director in a particular area decides to cancel his contract with Brown-Service, the defendants have threatened to build a competing funeral home in the same locality. Liberty National, it is asserted in the complaint, has threatened to cancel contracts of those who oppose its activities. Moreover, the plaintiffs allege acts of physical violence in Liberty National's asserted attempt to monopolize the industry. Without a hearing to establish the validity of such contentions, the district court could not accurately determine the applicability of this limitation of the McCarran Act.

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[13] 15 U.S.C. § 1013(b) (1970). This provision provides:

> (b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

[12] In determining whether there is state regulation of the insurance business, the courts have adopted varying points of view. In Ohio AFL-CIO v. Insurance Rating Board, 451 F.2d 1178 (6th Cir., 1971), cert. den., 409 U.S. 917, 93 S.Ct. 215, 34 L.Ed.2d 180 (1972), the court stated that the requirement of state regulation under the McCarran Act is satisfied if the state has " 'generally authorized or permitted certain standards of conduct.' " *Id.* at 1182. The regulatory scheme was considered sufficient even though it may not have been enforced. In Travelers Ins. Co. v. Blue Cross, 481 F.2d 80 (1973), the court recognized the test set forth in the insurance rating case, but then found that the state regulation was more "aggressive" and encompassing. Because we disagree with the district court for other reasons specified above, we need not determine either the standard or the extent of insurance regulation in Alabama at this time.

Finally, plaintiffs argue that the trial court incorrectly granted the motion to dismiss based on a consent decree entered into between the defendants and the United States in 1954. This is true, plaintiffs argue, because they have alleged facts demonstrating that defendants have violated the terms of the decree. But even if the defendants have fully complied with the decree, plaintiffs say that they may challenge alleged activity that falls both outside and inside the terms of the decree.

[17, 18] The mere existence of the consent decree, of course, will not immunize the defendants from all anti-trust violations. If defendants have violated the terms of the decree, they should be held in contempt and enjoined from further violations.[14] Significantly, while defendants may have complied with the specific language of the decree, their activities may circumvent its underlying intent and thus violate the anti-trust laws. There are facts alleged in the complaint that indicate the defendants have not fully complied with the meaning and spirit of the decree. The district court could not accurately determine whether the decree constitutes an insurmountable obstacle to relief until it determined the validity of these averments.

Likewise, our conclusion is the same with regard to alleged illegal conduct that falls outside the scope of the decree. The consent decree is a narrowly drawn instrument that delineates conduct in which the defendants must and must not engage. The existence of such a narrow instrument cannot immunize the defendants from anti-trust violations that were not contemplated and specified in the decree. Even assuming that the defendants have complied with the specific narrow terms of the decree, the plaintiffs allege illegal conduct that, if estab-

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[14] Unless the private plaintiffs, in the court's discretion, intervened in the prior suit, it appears that the proper party to bring a contempt proceeding for violation of the 1954 decree is the United States. *See* United States v. Borden, 347 U.S. 514, 519, 74 S.Ct. 703, 98 L.Ed. 903 (1954).

lished at a hearing or trial, constitutes a violation of the anti-trust laws apart from the activities delineated in the decree. Conceivably, plaintiffs could prove a state of facts to support recovery that were not encompassed by the terms of the decree, and therefore the district court's granting a motion to dismiss was improper.

The plaintiffs argue that, even though the defendants might have complied with the decree's terms, they may now complain of the same conduct prohibited in the decree because they were not a party to what transpired in 1954, and consequently are not bound by it. The defendants respond by arguing that this suit alleges claims that basically are the same as those alleged by the government in 1954, that the consent decree resolved the same claims, and that they have complied and relied on the terms of the decree. As a consequence of this prior adjudication, defendants contend that plaintiffs cannot now complain of the same conduct, and thus the decree constitutes a bar to this suit. We cannot agree.

[19] It is well established that both a private plaintiff and a public plaintiff have a cause of action against a violator of the anti-trust laws. Each of these remedies is based upon different policy considerations, are considered cumulative, and may be pursued in complete disregard of the other. United States v. Borden Co., 347 U.S. 514, 518-519, 74 S.Ct. 703, 98 L.Ed. 903 (1954). The government is authorized to bring an action for the protection of the public's interest, and the private plaintiff is authorized to sue for specific injury he has sustained and injunctive relief to prevent further injury. *Id.* at 518. As the government may obtain an injunction in the public's interest, even after the private plaintiff has settled his claim, likewise the private plaintiff's action is not precluded by the government's separate suit pursuing relief. Sam Fox Publishing Co. v. United States, 366 U.S. 683, 690, 81 S.Ct. 1309, 6 L.Ed.2d 604 (1961). Indeed, to avoid amplifying the in-

herent complexity and confusion in anti-trust litigation, the courts have generally refused to allow a private plaintiff intervention to press his claim in a suit brought by the government. *See* Partmar Corp. v. United States, 338 U.S. 804, 70 S.Ct. 69, 94 L.Ed. 486 (1949); Allen Calculators Inc. v. National Cash Register Co., 322 U.S. 137, 64 S.Ct. 905, 88 L.Ed. 1188 (1944).

[20-23] Even though the allegations in the complaint in the case at hand may be similar to those in the 1954 case, this alone does not automatically preclude this cause of action. If plaintiffs would have brought this suit within four years after the government filed its claim in 1954, the complaint would have alleged a cause of action regardless of the similarity of the claims. The public and private causes of action are independent. Now that the four year statute of limitations has run, it appears that plaintiffs could not recover for damages sustained prior to 1954 because the government's initiation of a suit starts the period of limitations running. Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 85 S.Ct. 1473, 14 L.Ed.2d 405 (1965). But, as alleged in the complaint, when the defendant fraudulently conceals an anti-trust violation, the period of limitations does not begin to run until the violation is discovered or should have been discovered. General Electric Co. v. City of San Antonio, 334 F. 2d 480 (5th Cir., 1964); Kansas City v. Federal Pacific Electric Co., 310 F.2d 271 (8th Cir., 1962). It appears that the district court on remand will need to determine whether there was such fraudulent concealment of the facts to prevent the statute of limitations from running.

[24] Because the terms of consent decrees are precipitated through negotiation and compromise, it also is conceivable that the decree itself could authorize conduct that otherwise would violate the anti-trust laws, if not at the conception of the decree, through a subsequent change in circumstances. And

assuming, without deciding, that damages for past injuries sustained as a result of such a decree are not recoverable, we are not persuaded that plaintiffs would not be entitled to prospective injunctive relief. While the government's consent decree entered into in 1954 may have proscribed particular conduct and satisfied the public's interest, it may not have gone far enough to prevent further injury to the private plaintiffs.

In any event, the alleged facts of this case are not fully developed and, therefore, we cannot make a conclusive determination on any of these questions. Because it appears that plaintiffs could possibly prove a state of facts upon which they could recover, we reverse and remand for proceedings not inconsistent with this opinion.

United States Court of Appeals
For the Fifth Circuit

October Term, 1972

No. 72-3673

D. C. Docket No. CA 70-752

Edgar H. Battle, d/b/a Edgar H. Battle Funeral Home, et al.,
Plaintiffs-Appellants-Cross Appellees,

versus

Liberty National Life Insurance Company, et al.,
Defendants-Appellees-Cross Appellants.

Appeals from the United States District Court for the Northern District of Alabama

Before Wisdom and Ingraham, Circuit Judges, and Christenberry, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the order of the District Court ap-

pealed from, in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for proceedings not inconsistent with the opinion of this Court;

It is further ordered that defendants-appellees-cross appellants pay to plaintiffs-appellants-cross appellees, the costs on appeal to be taxed by the Clerk of this Court.

April 25, 1974

Issued as Mandate:

United States Court of Appeals
Fifth Circuit

Edward W. Wadsworth, Clerk
600 Camp Street
New Orleans, La. 70130
Office of the Clerk

October 23, 1974

To All Counsel of Record

Re: 72-3673 Battle, etc., et al. v. Liberty National Life Insurance Company, et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal

Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours

Edward W. Wadsworth
Clerk

By /s/ Anne G. Parent
Deputy Clerk

cc: Messrs. George R. Stuart, III
Edward L. Hardin, Jr.
Mr. Claude McCain Moncus
Mr. C. Neal Pope
Mr. Ira L. Burleson
Mr. Ralph B. Tate

APPENDIX B

Sherman Antitrust Act

Act of July 2, 1890, c. 647, § 1, 26 Stat. 209, as amended; 15 U.S. Code, Secs. 1, 2:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this

title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, ch. 647, § 1, 26 Stat. 209; Aug. 17, 1937, Ch. 690, Title VIII, 50 Stat. 693; July 7, 1955, ch. 281, 69 Stat. 282.)

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, ch. 647, § 2, 26 Stat. 209; July 7, 1955, ch. 281, 69 Stat. 282.)

Clayton Act

Section 3 of the Clayton Act, October 15, 1914, ch. 323, § 3, 38 Stat. 731, 15 U.S.C. § 14 provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or

other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. (October 15, 1914, ch. 323, § 3, 38 Stat. 731.)

Section 4 of the Clayton Act, October 15, 1914, ch. 323, § 4, 38 Stat. 731, 15 U.S.C. § 15, provides:

"Sec. 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (October 15, 1914, ch. 323, § 4, 38 Stat. 731.)

McCarran-Ferguson Act

Sections 1, 2, 3, 59 Stat. 34; July 25, 1947, ch. 326, 61 Stat. 448; 15 U.S.C. §§ 1011, 1012 and 1013:

"Section 1011. Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States. (Mar. 9, 1945, ch. 20, § 1, 59 Stat. 33.)

Section 1012. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law. (Mar. 9, 1945, ch. 20, § 2, 59 Stat. 34; July 25, 1947, ch. 326, 61 Stat. 448.)

Section 1013. (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation. (Mar. 9, 1945, ch. 20, § 3, 59 Stat. 34; July 25, 1947, ch. 326, 61 Stat. 448.)"

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-628

LIBERTY NATIONAL LIFE INSURANCE COMPANY, and BROWN-SERVICE FUNERAL HOMES COMPANY, INC.,
Petitioners,

vs.

EDGAR H. BATTLE, dba EDGAR H. BATTLE FUNERAL HOME; OTIS ARMOUR, JR., dba ARMOUR FUNERAL HOME; JOHNSON MEMORIAL FUNERAL DIRECTOR, INC.; TAYLOR HODGE, dba HODGE FUNERAL HOME; HENRY CILLIE, dba CILLIE FUNERAL HOME; EUGENE ERVIN, dba ERVIN FUNERAL HOME; S. T. MADDEN, dba MADDEN FUNERAL HOME; S. C. PERRYMAN, dba S. C. PERRYMAN FUNERAL HOME; R. L. LUMZY, JR., dba LUMZY FUNERAL HOME; J. K. JEFFRIES and FLOYD E. LONG, IND. & dba HAMILTON FUNERAL HOME; WHITFIELD MILES, IND. & dba MILES FUNERAL HOME,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals

for the Fifth Circuit

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

I

QUESTIONS PRESENTED FOR REVIEW

1. Does the "business of insurance" within the meaning of the McCarran-Ferguson Act encompass activities of an insurance

company which prevent or restrain competition among persons and firms in the funeral business, even when the challenged activities include specific acts of boycott, coercion and intimidation?

2. Does the existence of a Consent Decree entered into between the petitioners and the United States in 1954 immunize the petitioners from claims by private plaintiffs who were not parties to that decree for all antitrust violations, even when petitioners have violated the Consent Decree?

3. Can the fact of common ownership of two corporations who have availed themselves of the privilege of doing business through separate corporations save them from all of the obligations that the law imposes on separate entities, even when it is not necessary to allege a combination or conspiracy to allege a violation of Section 2 of the Sherman Act?

II

STATEMENT OF THE CASE

This action was brought in 1970 by funeral homes and directors of funeral homes against Liberty National Life Insurance Company (Liberty National) and Brown-Service Funeral Homes Company, Inc. (Brown-Service) charging the petitioners with numerous anticompetitive practices in the funeral business in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. § 1, 2; and Section 3 of the Clayton Act, 15 U.S.C. §§ 14, et seq.

The gravamen of the complaint is that at Liberty National's instigation, and with Brown-Service's assistance, the collective activities of the petitioners have resulted in control over a substantial portion of the market in funerals. The result is that all funeral directors in Alabama are faced with the choice of allow-

ing the petitioners to regulate the operation and maintenance of their funeral business or be foreclosed from a substantial share of the funeral market.

For over twenty-five years, Liberty National has issued burial insurance policies to such an extent that there are over two million, eight hundred thousand (2,800,000) policies presently in force, with the great majority of these policyholders residing in Alabama. (R 10, 12). In 1970, seventy percent (70%) of all white persons, and fifty percent (50%) of all persons, without regard to race, who died in Alabama had burial policies issued or guaranteed by Liberty National. (R. 12). In some areas of Alabama, ninety-five percent (95%) of all persons own a Liberty National burial policy. (R. 39). There are two basic policies issued: one which promises to provide a funeral equal to the "retail value" of Three Hundred ($300.00) Dollars, and one promising a funeral equal to the "retail value" of Six Hundred ($600.00) Dollars. The "retail value" is arbitrarily set in each policy by Liberty National, and the policyholder is not paid the "retail value." In lieu of cash, the policyholder is promised certain merchandise and services, the only difference in the two policies being the use of a metal or wooden casket. (R. 10, 11).

Brown-Service, a separate corporate entity and wholly-owned subsidiary of Liberty National, has contracted with Liberty National to furnish the merchandise and services required by the burial policies issued by Liberty National (R. 14, 15). Brown-Service has obtained agreements with funeral directors in Alabama who are designated "authorized funeral directors" and are required to furnish services and merchandise to Liberty National policyholders at prices set by Brown-Service. (R. 15, 16). For servicing the "$300.00 policy", the funeral director receives only Ninety ($90.00) Dollars. He receives only One Hundred Eighty ($180.00) Dollars for servicing the "$600.00 policy." He is required to furnish and perform identical services under both policies. (R. 34). If a policyholder takes his business to

an unauthorized funeral home, the benefits conferred under the policy include only a casket or, depending on the policy, a cash settlement. (R. 16).

Brown-Service currently has a contract with one hundred and ninety-two (192) of the total of two hundred and twenty-four (224) funeral homes in Alabama. Of the one hundred fourteen (114) funeral homes catering to the white community, only seven (7) homes have managed to fend off the control of Brown-Service. All seven of these homes, six of which are controlled by one man, sell their own burial insurance. The remaining one hundred and seven (107) directors are "authorized funeral directors". Of the one hundred and ten (110) homes catering to the black community, eighty-five (85) operate under a contract with Brown-Service and are "authorized funeral directors". (R. 16)

Funeral directors who have not entered into a contract with Brown-Service and who perform services equivalent to those called for under the policy receive no fee from Brown-Service The authorized director located in that service area receives the service fee although he has performed no services. (R. 33).

Brown-Service owns fifty-nine (59) funeral homes which are leased to funeral directors in Alabama. The leases require rental payments equal to a percentage of the gross receipts of the funeral director. All lessees must be "authorized funeral directors" and if Brown-Service cancels the funeral service contract, it may terminate the lease upon two days notice. (R. 10-20). Liberty National also owns funeral homes which are leased only to "authorized funeral directors".

The standard contract between Brown-Service and the funeral directors requires the director to do the following:

(1) Use caskets furnished by Brown-Service when providing services under a policy. (R. 31).

(2) Display in the funeral home merchandise furnished the director by Brown-Service. (R. 18).

(3) Post in noticeable places his prices for all funerals and vaults and adhere to these quotations without giving discounts. (R. 31).

(4) Maintain the funeral home and equipment to meet certain standards set by Brown-Service and be subject to inspection by Brown-Service to insure compliance. (R. 90—Paragraph 17).

(5) Refrain from sale of Brown-Service merchandise to customers other than Liberty National policyholders (R. 88—Paragraph 7). If the funeral director violates any of these provisions, Brown-Service may terminate the contract immediately. (R. 90—Paragraph 23).

Liberty National has engaged in the following activities which have intimidated, coerced and boycotted funeral directors in Alabama:

(1) Made known a long range program of building funeral homes and leasing them only to persons who would become authorized funeral directors or only if they remained authorized directors. (R. 33).

(2) Agreed to lend money at favorable terms and rates to funeral directors only if they agreed to become or remain authorized directors. (R. 33).

(3) Forced funeral directors to become or remain authorized funeral directors by threatening to build a competing funeral home in the same trade area and placing an authorized dealer in the new home. (R. 35). These threats have been carried out by building facilities of modern design. (R. 42).

(4) Allocated territories by arbitrarily applying standards of acceptability so as not to allow a funeral director to become authorized. (R. 36).

(5) Used concocted complaints of policyholders to intimidate funeral directors. (R. 36).

(6) Made loans to funeral directors to keep them indebted and thereby economically coerce them to remain under contract to Brown-Service. (R. 41).

(7) Forced one or more funeral directors to sell their business by threatening to cancel the director's contract with Brown-Service. (R. 44).

(8) Threatened to cancel funeral service contracts of authorized directors who voiced opposition to prices paid these directors for their services. (R. 44-45).

(9) Threatened physical violence in its efforts to monopolize the funeral business in Alabama. (R. 45).

The petitioners do not challenge the violations alleged, but seek immunity for their actions by virtue of the McCarron-Ferguson Act and a 1954 Consent Decree.

III

SUMMARY OF ARGUMENT

In a case involving a unique set of facts, petitioners contend this Court should consider a motion to dismiss the complaint before the complete facts are developed at trial. Petitioners urge this Court to grant a writ of certiorari without giving a single, or important reason, or even citing Rule 19 of this Court. It is contended simply by petitioners that the Fifth Circuit Court of Appeals erred in holding that the motion to dismiss should be overruled. They contend the motion should be granted because petitioners are exempt under the McCarran-Ferguson Act, are immune as a result of a 1954 Consent Decree, and because a conspiracy between a corporation and its subsidiary is not actionable.

Liberty National cannot monopolize the funeral business, require funeral directors to perform duties which Liberty National has not promised in its policies of insurance, or engage in additional conduct that does not come within the scope of the business of insurance and claim a McCarran Act exemption. The McCarran Act does not exempt acts of boycott, coercion and intimidation, and such acts are specifically alleged in the complaint. Brown-Service is not an insurance company.

The petitioners and the United States Government entered into a consent decree in 1954. The petitioners are subject to attack under the antitrust laws by respondents (private persons), despite the existence of the consent decree. This principle of law controls even if petitioners have complied with the terms of the consent decree. The consent decree of 1954 enjoined Liberty National and Brown-Service from hindering and restricting funeral directors in their business of providing funerals. As alleged, the petitioners have violated the decree.

A combination or conspiracy between a parent corporation and its wholly-owned subsidiary is actionable under the Federal antitrust laws. When the joint activities of the two companies have adverse effects on independent or outside business entities, the conspiracy is actionable under the most stringent application of the intra-enterprise doctrine. The respondents' complaint charges petitioners with Sherman 2 violations of monopolizing or attempting to monopolize the funeral business. One corporation, acting alone, can engage in illegal Sherman 2 activities, there being no requirement that the corporation act in concert with another entity. Therefore, if there were absolute immunity for a combination between a parent and any subsidiary, the complaint states a cause of action under Sherman 2, and a motion to dismiss raising the intra-enterprise defense is due to be overruled. This defense is not available to petitioners for the additional reason that the contracts between Brown-Service and the authorized funeral directors are contracts in restraint of trade in violation of Sherman 1.

IV

ARGUMENT

A. Considerations Governing Review of Certiorari.

The respondents filed suit on October 6, 1970, and after more than four years, are now before this Court seeking to uphold the ruling of the Fifth Circuit that the motion to dismiss the complaint should be overruled. The complaint alleges a set of circumstances peculiarly applicable only to the operations of funeral homes in the State of Alabama. Petitioners do not address themselves to the requirements of Rule 19(b) of the Rules of the Supreme Court of the United States or, except in their Conclusion, assert any of the reasons stated therein as to why this Court should grant their petition. They are simply asking this Court to consider the initial pleadings, which set out a unique fact situation, and rule of the applicable law before the complete facts are developed after a full trial. It has long been the policy of this Court not to consider cases on a piecemeal basis, and any of the arguments advanced in petitioners' brief could best be decided after reviewing a complete record. After resisting respondents' efforts to seek an opportunity of a trial for over four years, the petitioners now assert only that the Fifth Circuit was in error and give no special or important reason for granting Certiorari as required by Rule 19 of this Court. Apparently, petitioners contend a writ of certiorari is a matter of right in direct contradiction of the first sentence of Rule 19.

B. The Complaint Is Sufficient Against a Motion to Dismiss.

This suit was originally filed on October 6, 1970, and the District Court granted the Defendants' Motion to Dismiss with prejudice and without leave to amend on October 31, 1972. The Court found that the Complaint failed to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal

Rules of Civil Procedure. The standards to be followed in testing the Complaint under this rule are well known to this Court and will only be restated briefly at the outset. This Court, in following the spirit and aims of Federal procedure, has set down a general guideline for considering a Complaint.

> In appraising the sufficiency of the Complaint we follow, of course, the accepted rule that a Complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957).

In approving the language of *Conley*, supra, the Fifth Circuit in 1967 applied this standard specifically to antitrust pleadings.

> *As applied to antitrust pleadings* in a case where the Complaint was dismissed for lack of jurisdiction and for failure to state a claim upon which relief could be granted, the Supreme Court has said that *the test as to sufficiency is whether the claim alleged is wholly frivolous.* (cases cited); *Dailey v. Quality School Plan, Inc.*, 380 F. 2d 484, 486 (5th Cir. 1969) (Emphasis supplied)

The Fifth Circuit correctly determined that the respondents' complaint met the test as to sufficiency.

C. **The McCarran-Ferguson Act**

1. *The Business of Insurance.* Petitioners contend that the pleadings conclusively establish that the activities complained of constitute the "business of insurance" within the meaning of the McCarran-Ferguson Act (McCarran) as to both Liberty National and Brown-Service.

(a) *Liberty National.* Liberty National is not exempt from the Federal antitrust laws merely because it is an insurance

company. In determining the applicability of McCarran, it is necessary to examine the activities of Liberty National which are challenged in the complaint and then determine if these activities are within the "business of insurance" as contemplated by the McCarran Act. As stated in *Securities and Exchange Commission v. National Securities*, 393 U.S. 453, 89 S. Ct. 564, 21 L. Ed. 2nd 668 (1969), the statute did not purport to make the states supreme in regulating all the activities of insurance *companies*, its language refers not to the person or companies who are subject to state regulation, but to laws regulating the *business* of insurance.

> But whatever the exact scope of the statutory term, it is clear where the *focus was*—it was *on the relationship between the insurance company and the policyholder*. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the business of insurance (Emphasis supplied).

Although petitioners cite cases which deal with title insurance, life insurance and hospital insurance, they cite only one reported case which considers burial insurance.

In *Holly Springs Funeral Home v. United Funeral Service*, 303 F. Supp. 128 (D.C. Miss. 1969), the District Court dismissed the complaint after a trial. The plaintiff was a funeral director and burial insurance salesman. The Court found that in Mississippi it was customary for funeral homes to sell, as agents, burial policies within their market area. These policies also provided for a cash settlement in the event it was impractical for an authorized funeral home to handle the funeral. As the Fifth Circuit in the instant case noted however, there is one distinction between the funeral businesses in Alabama and Mississippi. In Mississippi a funeral home has no contractual obligation with anyone but remains free to solicit burials irrespective of burial insurance. In Alabama, a funeral home must give up a substantial portion of the funeral market to maintain this freedom.

Petitioners cite *Travelers Insurance Company v. Blue Cross of Western Pennsylvania*, 361 F. Supp. 774, Aff'd 481 F. 2d 80 (3 Cir. 1973) as authority to support their Motion to Dismiss. But in *Blue Cross*, the Trial Court reached its conclusions only after a lengthy trial, only after the facts had adequately been developed to make a conclusive determination that the defendant fell within the McCarran exemption. Also as the Fifth Circuit noted, the relationship between the insurance company and the hospitals in *Blue Cross* was a direct contractual relationship. The facts as alleged in this complaint show that Liberty National has exceeded the business of providing insurance and encroached upon the business of providing funerals. The contracts between Brown-Service and the funeral directors require the directors to perform duties which Liberty National is not obligated to perform under their policies. Liberty National has also engaged in additional conduct that does not come within the scope of the business of insurance. These requirements and activities are set out in the opinion of The Fifth Circuit at pages 23 and 24 of the Appendix to Petitioners brief.

Respondents do not attack the insurance contracts existing between Liberty National and its policyholders. Liberty National made its own choice to sell a policy which promised services and merchandise rather than promising cash. They could have chosen to pay each policyholder bushels of corn, a new automobile or any other commodity. Would this then allow the insurer to engage in anticompetitive practices against corn producers or allow them to monopolize the automobile industry? Would injured corn producers and automobile manufacturers both be barred because of an insurance exemption? If this were the law, an insurance company could be used merely as a vehicle to control another industry with complete immunity from the Federal antitrust laws.

In *Hill v. National Auto Glass Company, Inc.*, 293 F. Supp. 295 (N.D. Cal., 1968) and in the same case reported in 1971 Trade Cases § 73,594 (N. D. Cal. 1971), an automobile glass

installer brought an action against a liability insurer alleging antitrust violations by the insurer and others. The complaint charged that the insurer made arrangements on behalf of its insured and claimants for the sale, installation and service of automobile glass. In the 1968 *Hill* opinion the Court interpreted the scope of the "business of insurance" and refused to dismiss the complaint.

> While the settlement of claims by the payment of money could certainly be considered to reasonably fall within the general meaning of "business of insurance", it does not seem to this Court that the alleged activity involved here, namely, securing for particular glass dealers the sales and installation jobs required by Allstate claimants, is a part of the "business of insurance" as the term is normally understood. (Page 296)

Faced with the same question, the Court in the 1971 *Hill* decision again rejected the claimed McCarran exemption.

> Congress at no time indicated an intent to give insurance companies carte blanche to operate in concert with non-insurance companies. The McCarran Act will be narrowly construed by this Court to extend only so far as the problem it sought to solve. cf. *SEC v. National Securities*, 393 U.S. 453, 459 (1968). In this case the allegations of the complaint are that Allstate Insurance combined with National Auto Glass, an automobile glass shop franchisor, and others, to allocate business, fix prices, and boycott other glass sellers. These activities are alleged to have a tendency to monopolize the relevant market. Such activities, while they may be practiced by insurance companies, cannot be said to have been contemplated to be the "business of insurance" as contained in the McCarran Act. Accordingly, the Court finds that the McCarran Act does not apply to the above conduct, and therefore the defendant Allstate's motion to strike the antitrust sections of the complaint will be denied.

Just as the activities of Allstate in the glass industry go beyond the business of insurance, the activities of Liberty National have encroached on the business of providing funeral merchandise and services.

An analogy of the labor collective bargaining anti-trust exemption cases makes even clearer that Liberty National is not exempt. The basic premise of the labor exemption and the limits of its application were set forth in *Allen-Bradley Co. v. Local Union No. 3*, 325 U.S. 797 (1944). In that case, the union secured closed-shop agreements with all electrical contractors and manufacturers in the New York City area; they also obtained agreements binding the employer-contractors to purchase equipment only from those local manufacturers who had closed-shop agreements with the defendant. The Court found such restraints of trade achieved in concert between the union and *non-labor groups* to be *outside* the exception of § 17 of the Clayton Act (15 U.S.C. § 17), and thus subject to the Federal antitrust laws (i.e. the activities were not "the business" of labor legitimate collective bargaining); noting (325 U.S. at pp. 809-810):

> We think Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services . . . the exemptions granted the unions were special exemptions to a general legislative plan . . . Our holding means that the same labor union activities may or may not be in violation of the Sherman Act; dependent upon whether the union acts alone or in combination with business groups.

Inserting "insurance companies" for "unions" and companies and firms not engaged in the insurance business but in the business of the sale of funeral merchandise and the providing of funeral services for "non-labor groups" and "business groups" in the above language, highlights the applicability of the *Allen-Bradley* doctrine to the McCarran Act.

(b) *Brown-Service.* Petitioners contend Brown-Service is engaged in the business of insurance in direct contradiction of the allegations of the complaint. Attached to the complaint and incorporated therein is the Master Funeral Service Contract between Liberty National and Brown-Service (R. 74-83). The petitioners in that contract clearly state the nature of the business of Brown-Service but apparently ask this Court to overlook their own written declarations:

> Brown-Service is engaged in the manufacture and sale of funeral service merchandise and of providing services for the funeral and burial of deceased persons (R. 74).

Brown-Service, which is not an insurance company, cannot rely on an exemption relating to activities which constitute the business of insurance.

2. *Boycott, Coercion and Intimidation.* Petitioners, at page 21 of their brief, accuse respondents of lacing their complaint with "bald allegations" and "bald conclusions" of boycott, coercion and intimidation. After making this accusation, they then refuse to even acknowledge in their brief the following allegations in the complaint of illegal activities of Liberty National:

(1) Arbitrary application of standards of acceptability to prevent a funeral director from becoming authorized. (R 36)

(2) The use of concocted complaints of policyholders to intimidate funeral directors. (R. 36)

(3) The use of force to require a funeral director to sell his business. (R. 44)

(4) The use of threats to cancel funeral service contracts of authorized directors who raised opposition to prices paid these directors for their services. (R. 44-45)

(5) The use of threats of physical violence in efforts to monopolize the funeral business in Alabama. (R. 45)

Petitioners do not answer or explain these allegations, because they cannot. They reply simply "that funeral directors have the key in their own hand," but this key does not unlock the door to a free competitive market in the funeral business in Alabama. The Fifth Circuit, in their opinion in this case, recognized that Liberty National and Brown-Service had locked the door:

> At Liberty National's instigation and Brown-Service's assistance, the collective activities of the defendants have resulted in control over a substantial portion of the market in funerals. And it appears true, as the plaintiffs contend, that if a person wanted to enter the funeral business in Alabama, he would have to either sign a contract with Brown-Service or automatically relinquish the opportunity to attract business from this portion of the market. (A. 14)

Petitioners apparently would have this Court believe that all authorized funeral directors have freely chosen to accept $90.00 on a $300.00 policy, $180.00 on a $600.00 policy and have their operations regulated by Petitioners. It is totally unreasonable to assume that anyone would voluntarily agree to such inequitable terms and conditions.

Petitioners cite *Addrisi v. Equitable Life Assurance Society of U. S.*, —F. 2d—, 1974-2 Trade Cases § 75,274 (9 Cir. Sept. 30, 1974), in which a policyholder brought suit against the insurance company which issued the policy. The Court in *Addrisi* was concerned with the relationship between the policyholder and insurance company, as expressed in *Securities and Exchange Commission v. National Securities*, 393 U.S. 453, 89 S. Ct. 564, 21 L. Ed. 2d 668 (1969). After holding that the insurance company was exempt from the action brought by the policyholder, the Court set out its reasoning:

> We believe to hold otherwise would vitiate the McCarran-Ferguson Act in its concept of setting over unto the several states the regulation and protection of the insurer-insured relationship.

This relationship simply does not exist in this case. Even if *Addrisi* were extended only to protect agents of insurance companies, that Court would not condone prohibiting or excluding persons or firms from becoming insurance agents. The Brown-Service contracts, in paragraph 20, do not permit authorized funeral directors to engage in the business of burial insurance directly or indirectly, as agent or employee. (R. 90)

A limited application of 15 U.S.C. 1013(b) as urged by petitioners overlooks the express intent of Congress as revealed in the Congressional Record. In its section analysis of the McCarran Act, found in Report No. 143, 79th Congress, First Session, and entitled *Expressing the Intent of Congress With Reference to the Regulation of the Business of Insurance*, the House of Representatives states as follows:

> . . . And (b) provides that at *no time* are the prohibitions in the Sherman Act against *any* act of boycott, coercion or intimidation suspended. These provisions of the Sherman Act remain in *full* force and effect. (Emphasis supplied)

Inescapably, under the most limited application of § 1013(b), petitioners cannot contend that they can boycott, coerce and intimidate persons or firms not engaged in the business of insurance but engaged in the business of providing funerals and claim a McCarran exemption.

D. The Consent Decree of 1954.

Petitioners contend their Motion to Dismiss was properly granted based on a consent decree entered between the petitioners and the United States in 1954. They assert that they

have been engaging in conduct which is permissible under this decree and state, at page 32 of their brief, "since the respondents ask only for treble damages and offered no feasible proposal to improve the accommodation of the consent decree, respondents are not entitled to any relief in this action . . ."

This action was brought because Liberty National and Brown-Service have entered into an agreement or understanding and have embarked on a plan and program to hinder, restrict and prevent funeral directors in Alabama from selling funeral merchandise and performing funeral services. If the funeral directors are free to sell their merchandise and services in a competitive market, unrestricted and unrestrained by Liberty National and Brown-Service, then they have no cause of action. But the complaint is replete with how the funeral business has been monopolized and how the business of the funeral directors is hindered and restricted by petitioners.

The funeral director must do business with Brown-Service and Liberty National or be foreclosed from attracting any business from a substantial portion of the funeral market. Seventy percent (70%) of all white people who die in Alabama have a Liberty National policy and in some areas ninety-five percent (95%) of the people have such a policy. The services provided under the policy differ significantly, depending on whether an insured uses an authorized or unauthorized funeral home. If an unauthorized director is used, the policyholder could receive only a casket rather than all the services promised under the policy. The obvious choice of the policyholder is to use an authorized director, effectively foreclosing as much as 95% of the market to an unauthorized director.

In order to compete for this market, the funeral director is forced to agree to maintain the funeral home and equipment to meet the requirements of Brown-Service. He is forced to accept $90.00 for a $300.00 policy and $180.00 for a $600.00

policy. He is told what merchandise he must provide, to whom he can sell certain merchandise, and is prevented from giving discounts on some of his merchandise. Regardless of his choice of two evils, the director in 1970 was hindered, restricted and prevented from selling funeral merchandise and performing funeral services.

Have the petitioners complied with the Consent Decree of 1954? In paragraph six of the Decree, *petitioners were specifically enjoined and restrained from adhering to any agreement, plan or program, directly or indirectly, with any funeral director in Alabama which hinders, restricts or prevents any such director from selling funeral merchandise or performing funeral services for any other person.* (R. 170). If petitioners had complied with what they had agreed to do in 1954, this action would have never been filed. Surely petitioners do not contend that they can flagrantly violate a Decree and then claim they are immune from a treble damage action by virtue of the very decree which they have violated.

On June 29, 1954, the United States filed a complaint against the petitioners. (R. 153-162). Thirty minutes later the petitioners filed their answer (R. 163-165) and the Consent Final Judgment was filed the same day. (R. 166-173). In 1954, there were no provisions in effect which afforded interested parties an opportunity to object to the terms of the settlement.

In 1914, Congress passed the Clayton Act, and Section 5(a) in its final form provided that under certain circumstances a decree in a case brought by the government which held that a defendant has violated the antitrust laws could be introduced in a private action (15 USC 16(a)). Prior to passage of the act, the proposed legislation provided that a defendant could use a favorable decree in a government action as conclusive evidence in a private action. 51 *Cong. Rec.* 9491 (1914). The arguments advanced in 1914 by Mr. Cullop against the

use of a favorable decree are applicable to petitioner's contentions in 1974.

> The courthouse doors ought to swing inwardly, and do to every citizen of this country. Yet if we enact this provision as the committee has brought it in here we have closed the doors of the courthouse to the citizens of this country. That is a matter of the highest concern to them. We will have denied to the citizen by the enactment of this provision the right to go into Court and recover damages for wrongs inflicted. Why? Forsooth, because a collusive suit has been brought in some place, or had been tried without preparation, or had been tried without sufficient evidence; and yet a stranger, an innocent person, is bound by that decree. He had no say; he took no part in it; and yet by this proposed legislation the door would be shut against him and his cause of action. We are adopting antitrust legislation for relief to a suffering public, furnishing a remedy for wrongs long perpetrated, but I fear if provisions of this kind are incorporated in the measure we will not accomplish our purpose or perform the duty as well as the people desire it should be done. I hope that the amendment of the gentleman from Minnesota (Mr. Volstead) will be adopted. 51 *Cong. Rec.* 9493 and 9494 (1914)

The question of whether defendants in a private suit might use a favorable decree in a prior government suit was specifically considered and expressly rejected when the amendment was adapted by Congress. The idea of determining the rights of private litigants by a prior decree when the interests of the private litigants were not necessarily protected was as repugnant sixty years ago as it is today. The Fifth Circuit in it opinion in this case noted that the remedies of private and public actions are based upon different policy considerations, are considered cumulative and may be pursued in complete

disregard of each other. *United States v. Borden Co.*, 347 U.S. 514, 518-519, 74 S. Ct. 703, 98 L.Ed. 903 (1954).

Petitioners rely on a dicta in a District Court decision to assert that respondents are not entitled to claims for treble damage. In *United States v. General Electric Company*, 358 F.Supp. 731 (1973), the Court granted the Government's motion for summary judgment although the defendant relied on *res judicata* and collateral estoppel as a result of prior actions between the same parties. In that case the defendant stressed its good faith adherence to prior decisions. The petitioners in this case however have not only failed to rely on the 1954 decree, but have violated its orders. The District Court in *U.S. v. General Electric, supra*, apparently relied on *Simpson v. Union Oil Co.* (II), 396 U.S. 13, 90 S. Ct. 30, 24 L. Ed. 2d 13 (1969). In *Simpson*, this Court rejected the contentions that relief should be prospective only. Petitioners cite no cases which deny the right to claim treble damages. The *General Electric* case cites *Lawler v. National Screen Service Corp.*, 349 US 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955) which expressly rejected the contention which in effect would grant petitioners partial immunity from civil liability for future violations because such a result is consistent with neither the antitrust laws nor the doctrine of *res judicata*.

At page 32 of petitioners' brief it is asserted that respondents asked only for treble damages. The complaint asks for injunctive relief enjoining the violations of antitrust laws, that contracts be declared illegal and terminated, that petitioners be required to divest themselves of ownership of any interest in certain property, that petitioners be directed to permit all funeral directors the opportunity to freely compete for the right to service burial policies and manufacturers the opportunity to freely supply funeral merchandise. (R 56-58).

Petitioners state at page 29 of their brief that in *K-91, Inc. v. Gershwin Publishing Company*, 372 F2d 1 (9 Cir. 1967) cert.

den. 389 US 1045, 88 S.Ct. 761, 19 L.Ed. 2d 838, Judge Burnes decided that, since the parties had operated in compliance with the decree, the antitrust laws were not violated and the defendants were immunized from liability. Not only was this question not decided, the opinion expressly refutes petitioners' statement.

> Since the trial court found no violations of the antitrust laws, we do not reach the question of whether activities which would otherwise be a violation of the antitrust laws could be rendered immune because consistent with the terms of the consent decree.

The consent decree in *K-91* provided that an applicant who contended that a license fee was unreasonable had a remedy. He could require ASCAP to assume the burden of proving to the District Court that the price charged was reasonable. The Court held that because of the consent decree, ASCAP did not have the power or authority to fix prices; that authority rested with the District Court. In *K-91*, the aggrieved party did not afford himself of the remedy provided.

Petitioners finally assert their own deductions from the opinion in *Columbia Broadcasting System v. ASCAP*, 337 F.Supp. 394 (S.D. N.Y. 1972). Because of the economic realities of the market, the Court recognized, as in *K-91*, that there must be some form of centralized licensing system which serves the mutual interests of copyright holders and music users. Because of these economic realities, this Court has often applied the rule of reason test to activities which would otherwise call for the per se test. The Court in *Columbia Broadcasting*, regarded the judgment in *K-91* as constituting an implied partial repeal of the antitrust laws, with the caveat that the regulatory system may be permitted to encroach upon the antitrust laws only to the minimum extent necessary. *Columbia Broadcasting* held that if CBS could prove that the regulatory system can be amended to operate on a more competitive basis, then the antitrust laws were

being encroached upon more than to the "minimum extent necessary".

Petitioners seek immunity in this case from respondents by virtue of the 1954 decree. They do not seek the application of a rule of reason but ask that the complaint be dismissed. This is in direct contravention of *Columbia Broadcasting*, upon which they rely.

> However, the application of a rule of reason test to ASCAP's activities does not mean that it is immune to the antitrust laws. Nor does the regulation of ASCAP by the consent decree furnish it immunity . . . *Granted that a party is subject to attack under the antitrust laws despite the presence of a consent decree*, the question we are presented with in this case is: Under what circumstances may a defendant's activities, previously sanctioned as falling within the rule of reason, be currently judged to be in violation of the antitrust laws.

The Justice Department and the petitioners, in the 1954 case, found no unusual economic conditions prevailing in the funeral business so as to encroach upon the antitrust laws. They agree to a decree that enjoined petitioners from entering into an agreement, plan or program which directly or indirectly hindered or restricted any funeral director from selling merchandise or performing funeral services. Petitioners now seek immunity from a decree which they have violated.

E. **Combination and Conspiracy Between Separate Corporate Entities.**

Petitioners call upon this Court, at Page 33 of their brief, to determine the "location of the boundaries between legal and illegal business conduct" between a parent corporation and its wholly-owned corporate subsidiary. They contend that this

question is properly raised by their Motion to Dismiss, but they have overlooked two obvious hurdles which prevent them from reaching this question.

Apparently, petitioners contend that the complaint should have been dismissed because there can be no actionable combination or conspiracy under the antitrust laws. Part B of the offenses charged in the complaint, however, alleges that the petitioners have monopolized or attempted to monopolize the funeral business. (R. 36-45) These allegations of violations of Section 2 of the Sherman Act obviously do not require a combination or conspiracy by the express language of the statute:

> Every person who shall monopolize, or attempt to monopolize . . . any part of trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor . . . 15 U.S.C. § 2.

Petitioners cannot contend that there must be a combination or conspiracy before there is a violation of Section 2. This is not the law. A motion to dismiss raising the intra-enterprise conspiracy doctrine is totally inadequate to attack a claim of monopoly or attempt to monopolize.

Petitioners, if successful in raising the question of whether or not a conspiracy between a parent and its subsidiary is actionable, are faced with the clear language in the opinion of this Court, delivered by Mr. Justice Black:

> But since respondents . . . availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities. *Perma Life Mufflers, Inc. v. International Parts Corporation*, 392 U.S. 134, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968).

Even assuming that the broad intra-enterprise conspiracy doctrine cannot be accepted, petitioners cannot prevail on a more

limited interpretation of that doctrine as expressed in the commentaries cited in their brief. At page 41 of their brief, Assistant Attorney General McLaren is quoted as follows regarding the policy of the Department of Justice:

> Instead, we have limited our use of the intra-enterprise doctrine to situations in which the commonly-controlled firms have pooled their power in a manner which has adverse effects on independent business entities.

This was also the policy of the Department of Justice in 1954 when the United States brought the action against these two petitioners for violation of the antitrust laws. (R 153-162). Brown-Service was a wholly-owned subsidiary of Liberty National at that time. (R 154). At page 43 of petitioners' brief, Von Kalinowski recognizes that a conspiracy is actionable where the purpose and effect of the joint action is to unreasonably restrain the trade of outsiders. And even under the most restricted viewpoint, Willis and Pitofsky at page 44 of petitioners' brief, recognize antitrust liability where the enterprise chooses to do business through corporate components with the intent of using these components to achieve an anti-competitive result.

It is clear that under a restricted application of the intra-enterprise doctrine, the conspiracy of the petitioners is applicable. But there is a second barrier to even reaching the question of the applicability of this doctrine. Not only is the conspiracy between the petitioners actionable, the agreements signed by the authorized directors are contracts in restraint of trade. *Perma Life Mufflers, Inc., supra,* unequivocably holds that these agreements are actionable:

> In any event each petitioner can clearly charge a combination between Midas and himself, as of the day he unwillingly complied with the restrictive franchise agreements (cases cited) or between Midas and other franchise dealers, whose acquiescence in Midas' firmly enforced restraints was induced by the communicated danger of termination.

The contracts between Brown-Service and the authorized funeral directors are agreements in violation of Section 1 of the Sherman Act (15 U.S.C. 1).

V

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted

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Certificate of Service

Pursuant to Supreme Court Rule 33.1, I hereby certify that I have caused three copies of this Respondents' Brief in Opposition to Petition for a Writ of Certiorari to be deposited in a United States Post Office or Mail Box, with air mail postage prepaid, addressed to Ira L. Burleson, Liberty National Life Building, Post Office Box 2612, Birmingham, Alabama 35202, and Ralph B. Tate, 800 John Hand Building, Birmingham, Alabama 35203, Counsel of Record for Petitioners on this 16th day of December, 1974.

George R. Stuart III
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